Supreme Court, U.S.
FILED
SEP 9 - 2005
OFFICE OF THE CLERK

No. 05-319

In The
Supreme Court of the United States

PETER LONGANBACH, an individual,

Petitioner,

v.

DAVID GENZLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EDWARD PATRICK SWAN, JR.
Counsel of Record
CHARLES A. BIRD
TODD R. KINNEAR
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
(619) 236-1414
Counsel for Petitioner Peter J. Longanbach

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

With probable cause, the police arrest a suspect for murder. The police finish their investigation and write their reports. A prosecutor meets with an eyewitness to prepare her to testify at a pretrial hearing. During the meeting, questions are asked of the witness. The killer, convicted of aggravated manslaughter, sues the prosecutor under 28 U.S.C. § 1983 after serving his sentence. The killer claims that the prosecutor tampered with the witness's testimony during the pretrial meeting, causing him to be bound over and initially convicted of murder. The District Court denies the prosecutor summary judgment, refusing to recognize absolute prosecutorial immunity because the questions at the meeting made it investigatory and not advocatory. The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirms in a published opinion.

One question is presented:

1. During a pretrial meeting to prepare a witness to testify, does a prosecutor forfeit absolute immunity by asking the witness questions?

LIST OF PARTIES TO THE PROCEEDING

Peter J. Longanbach, Petitioner

David Genzler, Respondent

Jeffrey O'Brien

County of San Diego

San Diego County District Attorney's Office

Gregory Thompson

James Pippen

Paul Pfingst

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. SUPREME COURT REVIEW IS REQUIRED TO SECURE INTER-CIRCUIT UNIFORMITY	5
II. SUPREME COURT REVIEW IS REQUIRED BASED ON THE EXCEPTIONAL IMPORTANCE OF THE NINTH CIRCUIT'S DECISION	7
A. The Ninth Circuit Erred as a Matter of Law – Coercing Testimony Is Clearly Advocatory Conduct	7
B. The Present Decision Creates a Dangerous and Unworkable Precedent	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003) 9

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) .. 5, 7, 8, 10, 13

Burns v. Reed, 500 U.S. 478 (1991) 12

Cousin v. Small, 325 F.3d 627 (5th Cir. 2003) 4, 5, 6, 7, 9

Dory v. Ryan, 25 F.3d 81 (2d Cir. 1994) 8

Genzler v. Longanbach, 384 F.3d 1092 (9th Cir. 2004), *withdrawn and replaced by Genzler v. Longanbach*, 410 F.3d 630 (9th Cir. 2005) 1

Genzler v. Longanbach, 410 F.3d 630 (9th Cir. 2005) 1, 7, 11, 12

Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) 8

Imbler v. Pachtman, 424 U.S. 409 (1976) 8, 13

Kalina v. Fletcher, 522 U.S. 118 (1997) 7, 11

Milstein v. Cooley, 257 F.3d 1004 (9th Cir. 2001) 13

Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984) 10, 11

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 ..... 1, 2

OPINIONS BELOW

The District Court's decision granting in part and denying in part Petitioner's motion for summary judgment (App., p. 27) is unreported. The initial opinion of the Ninth Circuit affirming that decision is reported at 384 F.3d 1092. After Petitioner petitioned for rehearing and *en banc* rehearing, the Ninth Circuit withdrew and replaced its initial opinion with the opinion reported at 410 F.3d 630 (App., p. 1), and denied the petitions for rehearing.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. § 1331 because plaintiff and respondent David Genzler ("Genzler") based his complaint on 28 U.S.C. § 1983. The Ninth Circuit had jurisdiction because the District Court denied in part a claim of absolute prosecutorial immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

The Ninth Circuit entered its initial opinion affirming the District Court's opinion as to Petitioner on September 27, 2004. The Ninth Circuit withdrew and replaced its initial opinion on June 7, 2005, and denied Petitioner's request for rehearing and *en banc* rehearing that same day. (App., p. 1).

STATUTE INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On April 18, 1996, Genzler stabbed and killed Dustin "Dusty" Harless during a street fight outside a San Diego bar. Mr. Harless's girlfriend, Sky Blue Flanders, witnessed the killing. Genzler fled the scene but surrendered to the police the next day and was arrested. Genzler conceded that his arrest was based on probable cause. On April 23, 1996, a criminal complaint was filed charging Genzler with second degree murder while using a deadly weapon and assault with a deadly weapon. On April 24, 1996, the San Diego Police Department finished its investigation of

the murder, [illegible] submitted its written reports to the San Diego County District Attorney's Office.

Petitioner Peter J. Longanbach ("Longanbach"), a San Diego County Deputy District Attorney, was assigned to prosecute the criminal case against Genzler, including the preliminary hearing and jury trial. Genzler was convicted of second degree murder while using a deadly weapon and assault with a deadly weapon. Those convictions were overturned on appeal because the trial court erroneously disqualified Genzler's chosen attorney and failed to instruct the jury on a lesser included offense. A second jury convicted Genzler of involuntary manslaughter with use of a deadly weapon and assault with a deadly weapon.

Genzler's first conviction for murder now forms the basis of his present civil rights claims against Longanbach, the San Diego District Attorney's Office, former District Attorney Paul Pfingst, the County of San Diego, and other individuals involved in Genzler's initial prosecution. After twice being convicted of killing Harless, Genzler alleged Longanbach and Jeff O'Brien ("O'Brien"), a District Attorney Investigator, violated Genzler's civil rights by, among other things, causing Ms. Flanders to change her testimony during the prosecution.

While Longanbach denies every allegation of wrongdoing, he challenged Genzler's claims through a motion for summary judgment based in part on absolute prosecutorial immunity. The District Court granted Longanbach's summary judgment motion almost entirely, finding either that absolute prosecutorial immunity shielded Longanbach from the allegations, or alternatively, that there was no evidence to support those allegations. However, the District Court held Longanbach lacks absolute immunity

from the allegation that he met with Ms. Flanders in preparation for the preliminary hearing and told her that "in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past." It is only this ruling that Longanbach now challenges.

On September 27, 2004, a panel of the Ninth Circuit issued a decision affirming the District Court's ruling, holding there was evidence in the record "support[ing] the conclusion that Longanbach [was] engaged in an investigative function during the meeting," and therefore he is not entitled to the absolute immunity protection for "advocatory" conduct. Longanbach petitioned for a rehearing from both the panel and the Ninth Circuit *en banc*. On June 7, 2005, the Ninth Circuit panel withdrew and replaced its first opinion, and denied both petitions. The revised opinion reached the same conclusion as the September 27, 2004 decision.

SUMMARY OF ARGUMENT

This Court should grant review of the Ninth Circuit's decision for at least three reasons. First, the Ninth Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), which is based on very similar circumstances and almost identical allegations.

Second, the Ninth Circuit's decision is the first to deny prosecutorial immunity to a prosecutor for allegedly coaching an eyewitness to lie when the alleged lie was only used in court to support a criminal prosecution. Indeed, it is the first case to deny prosecutorial immunity to a

prosecutor for acts expressly found to be related to trial preparation. The Ninth Circuit's decision conflicts with prior decisions of this Court.

Third, the Ninth Circuit's decision will not only set an unworkable and likely unintended precedent, it will stifle the advocacy the public expects from prosecutors, essentially vitiating absolute immunity itself. As it stands now, any prosecutor who asks questions of a witness, even long after an arrest based on probable cause, is not entitled to absolute immunity from the allegation the prosecutor also improperly told that witness how to testify.

ARGUMENT

I. SUPREME COURT REVIEW IS REQUIRED TO SECURE INTER-CIRCUIT UNIFORMITY

The Ninth Circuit's decision directly conflicts with the Fifth Circuit's decision in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003). In *Cousin*, the plaintiff alleged that the prosecutor coerced and intimidated a witness to give false trial testimony and suppressed exculpatory evidence. After discussing Supreme Court precedent, and noting that the existence of probable cause "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards," (325 F.3d at 633, *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n. 5 (1993)), the court stated that:

> In this case . . . the question of absolute immunity turns on whether [the plaintiff] had been identified as a suspect at the time [the witness] was interviewed and whether the interview related to testimony to be presented at trial.

325 F.3d at 633.

With that framework in mind, the *Cousin* Court held that coaching a witness to testify and allegedly to lie is advocatory:

> The record therefore demonstrates that, at the time of [deputy district attorney] Jordan's . . . conversations with [the witness] Rowell, in which Jordan allegedly told Rowell to implicate Cousin falsely in the murder and coached him how to testify, Jordan was acting as an advocate rather than as an investigator. The interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause. Jordan therefore is entitled to absolute immunity with respect to this claim.

Id. at 635.

As in *Cousin*, Longanbach met with Ms. Flanders *after* Genzler had been arrested based on probable cause, *after* the police had conducted their investigation and written their reports, and *after* Ms. Flanders had given statements to the police. Like *Cousin*, the witness meeting was designed "to secure evidence that would be used in the presentation of the state's case," not to identify an unknown suspect or establish probable cause to arrest. Genzler himself alleges that Longanbach met with Ms. Flanders and told her to lie in order to secure a conviction. That allegation in fact forms the primary basis for his claimed civil rights violation.

The Ninth Circuit's fuzzy analysis here conflicts directly with the bright line drawn in the Fifth Circuit. The Ninth Circuit failed to distinguish *Cousin*. The opinion attempted to set aside *Cousin* because on its record the

prosecutor met with the witness "to tell the witness how he should testify." App., p. 23; 410 F.3d at 643 (*citing Cousin*, 325 F.3d at 633). The Ninth Circuit concluded that the record here shows "a process of police-type investigation – or, viewed in the light most favorable to Genzler, a process of manufacturing evidence while performing police-type investigative work – not Longanbach or O'Brien acting as advocates by actively preparing Flanders for her testimony in court." App., p. 23, 410 F.3d at 643. This ruling violates Genzler's own complaint and remanufactures his case. The charge from which Longanbach sought immunity is that he "met with Ms. Flanders and told her that in order to secure a conviction, she needed to lie. . . ." App., pp. 64-65. No distinction can be made between "secure evidence that would be used in the presentation of the state's case" in *Cousin* and "secure a conviction" here.

II. SUPREME COURT REVIEW IS REQUIRED BASED ON THE EXCEPTIONAL IMPORTANCE OF THE NINTH CIRCUIT'S DECISION

A. The Ninth Circuit Erred as a Matter of Law – Coercing Testimony Is Clearly Advocatory Conduct

By applying qualified rather than absolute immunity to Genzler's allegations and the summary judgment record, the Ninth Circuit erred and trampled this Court's precedent. A prosecutor's actions "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997) (*citing Buckley*, 509 U.S. at 273). "Prosecutorial immunity from § 1983 liability is broadly defined, covering 'virtually all acts,

regardless of motivation, associated with [the prosecutor's] function as an advocate.'" *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995) (*citing Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994)).

In *Buckley*, 509 U.S. at 273, this Court drew the line between absolute and qualified immunity: "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* Thus, when a prosecutor "functions as an administrator rather than as an officer of the court, he is entitled only to qualified immunity." *Id.* (*citing Imbler v. Pachtman*, 424 U.S. 409, 431, n. 33 (1976)). Explaining "investigatory" and "advocatory" conduct, this Court described the material difference between:

> the advocate's role in evaluating evidence *and interviewing witnesses* as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

Id. (emphasis added).

This Court has therefore recognized that advocatory conduct includes trial preparation and its indispensable component of witness interviews. *Buckley*, 509 U.S. at 273 (absolute immunity protects a prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made."). Although the existence of probable cause is not conclusive, "[t]he necessary implication is that after probable cause has been established, it is more likely that

the prosecutor acts as an advocate." *Cousin*, 325 F.3d at 633. *See also Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003) ("Prosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established or criminal proceedings have begun when they are performing a quasijudicial function.").

The allegations in paragraph 66 of the First Amended Complaint that Longanbach challenged in the motion for summary judgment make clear that he was not searching for clues to form probable cause when he met with Ms. Flanders, nor trying to identify a suspect. The fact that Longanbach may have asked questions of Ms. Flanders during this same meeting does not change the function of the alleged instruction on how to testify from advocatory to investigatory. Longanbach was allegedly telling a witness what she needed to say at the preliminary hearing and trial in order to convict Genzler:

> [Mr. Longanbach and Mr. O'Brien] suborned perjury. Specifically, prior to the preliminary hearing and during the initial investigation of the incident, LONGANBACH and O'BRIEN met with Ms. Flanders *and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past.*

App., pp. 64-65 (emphasis added).

Other allegations confirm that Genzler is suing Longanbach for instructing Ms. Flanders how to testify in court:

> As indicated above, Sky Flanders was also told to testify falsely about having actually seen Mr. Harless in prior street or bar fights and

> about her knowledge of his being in other fights/brawls.
>
> . . .
>
> LONGANBACH and O'BRIEN knew that Ms. Flanders' testimony as to her knowledge of past aggressive conduct by Dusty Harless would be critical to gaining the conviction that they sought.

App., p. 65.

There is no dispute that probable cause to prosecute Genzler for murder existed at all times of Longanbach's alleged wrongdoing. Genzler has never argued otherwise.[1] The Ninth Circuit's ruling is the first published precedent denying a prosecutor immunity for acts allegedly taken while meeting with a witness after probable cause has been determined, and instructing her how to testify. The opinion and analysis are contrary to the principle that "interviewing witnesses" and "evaluating evidence" are advocatory and therefore entitled to absolute immunity if done in preparation for trial. *Buckley*, 509 U.S. at 273; *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 679 (9th Cir. 1984) ("Investigative functions carried out pursuant to the preparation of a prosecutor's case also enjoy absolute immunity.").

---

[1] Nor could he. At the time of the April 29, 1996 meeting, the police had conducted their investigation of the crime scene, interviewed numerous witnesses, and arrested Genzler 10 days earlier after he turned himself in. App., pp. 98-99 (¶ 5), 105-145. The police had interviewed Ms. Flanders on videotape, and she had given statements to the police. App., p. 64. The Ninth Circuit's ruling correctly noted that "Genzler concedes [his arrest] was based on probable cause." App., p. 16, 410 F.3d at 639.

The error in the Court's ruling is based on its "focus on whether the character of the meetings was more in the nature of quasi-judicial advocacy or police-type investigative work." App., p. 17, 410 F.3d at 640. However, the "character" of a meeting is not the proper test. The determination instead must be based on "the nature of the function" Longanbach was performing when he allegedly violated Genzler's civil rights. *See Kalina*, 522 U.S. at 127 ("in determining immunity, we examine the nature of the function performed. . . ."); *Ybarra*, 723 F.2d at 678 ("The proper focus, it must be emphasized, is on the nature of the challenged activity."). Here, the alleged activity that violated Genzler's rights was telling a witness how to testify. It was not asking questions. Longanbach's "function" in doing so was advocatory, as in Genzler's own words, Longanbach was attempting "to secure a conviction" at trial. Longanbach was therefore acting as an advocate. The fact that he may have also asked Ms. Flanders "investigatory" questions during the same meeting should be of no moment.[2]

Finally, the Ninth Circuit also ruled that Longanbach could be liable for directing O'Brien's actions during a

---

[2] The only evidence in the record upon which the Ninth Circuit appeared to rely in finding that Longanbach was engaged in an investigative function during the April 29, 1996 meeting was the "Witness Interview" notes prepared by O'Brien reflecting the meeting. App., p. 22, 410 F.3d at 642. While it is unclear why the Ninth Circuit found that taking notes suggests a meeting was investigative, Longanbach objected to these notes when they were introduced into the trial court record as hearsay, hearsay within hearsay, and lacking authentication. While addressing some of Longanbach's objections (*see, e.g.*, App., pp. 40-41), the District Court did not rule on Longanbach's specific objections to these notes. Longanbach continues to assert they are not a proper part of the record of this case.

meeting prior to April 29, 1996 in which O'Brien met with Ms. Flanders alone. App., p. 19, 410 F.3d at 641. There is no evidence in the record, or even an allegation in the complaint, that any constitutional violation occurred during that meeting. In fact, the complaint alleges, "Longanbach *and* O'Brien met with Ms. Flanders and told her to lie," indicating that the constitutional violation occurred at the April 29, 1996 meeting which they both attended. *See* App., pp. 64-65. There is no evidence that Longanbach told O'Brien to meet with Flanders prior to their joint April 29, 1996 meeting, no evidence Longanbach told O'Brien what to do, and no evidence O'Brien told Ms. Flanders to lie at that meeting.

Longanbach is immune from the allegation he told Ms. Flanders to lie in order to secure a conviction, and the Ninth Circuit's decision to the contrary should be vacated and reversed.

B. The Present Decision Creates a Dangerous and Unworkable Precedent

The effect of the Ninth Circuit decision is that a prosecutor's absolute immunity during witness preparation now turns on whether the prosecutor asks questions. To avoid absolute immunity, a plaintiff need only allege and offer evidence, often from a person of dubious credibility like Ms. Flanders, that the prosecutor questioned the witness. This standard is dangerous and unworkable.

As this Court has recognized, absolute immunity is warranted (1) to allow prosecutors to focus their energies on prosecuting rather than defending lawsuits (*Burns v. Reed*, 500 U.S. 478, 485 (1991)); (2) to enable prosecutors to exercise independent judgment in deciding which suits

to bring and how to conduct those suits in court (*id.*); (3) to preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant evidence because of a prosecutor's fear of suit (*Imbler*, 424 U.S. at 426); and (4) to ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that such rulings could subject the prosecutor to civil liability. *Id.* at 427. At the same time, "prosecutorial misconduct is deterred, apart from private civil actions, by the threat of criminal prosecution and professional discipline, and by the prosecutor's accountability to either superiors or the electorate." *Milstein v. Cooley*, 257 F.3d 1004, 1008 (9th Cir. 2001).

The Ninth Circuit's ruling ignores these policy considerations by functionally foreclosing early termination of any suit by a person accused or convicted of a crime who alleges wrongdoing occurred during a meeting between a prosecutor and a witness. If this ruling is not reversed, one could not blame a prosecutor for refusing to talk to witnesses prior to a preliminary hearing or trial, which this Court has otherwise correctly understood to be part of the "evaluation of evidence." *Buckley*, 509 U.S. at 273. The chilling consequences for prosecutorial effectiveness should be obvious, but apparently they were not to the Ninth Circuit. The appellate court's policy error alone justifies reviewing and reversing its opinion.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EDWARD PATRICK SWAN, JR.
Counsel of Record
CHARLES A. BIRD
TODD R. KINNEAR
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
(619) 236-1414
Counsel for Petitioner
Peter J. Longanbach

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DAVID GENZLER, *Plaintiff-Appellee*, v. PETER J. LONGANBACH, *Defendant-Appellant*, and JEFFREY O'BRIEN; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE; GREGORY THOMPSON; JAMES PIPPEN; PAUL PFINGST, *Defendants*.	No. 02-56572 D.C. No. CV-01-01462-JNK
DAVID GENZLER, *Plaintiff-Appellee*, v. PETER J. LONGANBACH; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, *Defendants*, and JEFFREY O'BRIEN; GREGORY THOMPSON; JAMES PIPPEN; PAUL PFINGST, *Defendants-Appellants*.	No. 02-56573 D.C. No. CV-01-01462-JNK ORDER WITHDRAWING OPINION AND DENYING PETITION FOR REHEARING AND OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted
December 2, 2003 – Pasadena, California

Filed June 7, 2005

Before: Harry Pregerson, Robert E. Cowen,*
and William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher

COUNSEL

Robert L. Young, Edward Patrick Swan, Jr., Luce, Forward, Hamilton and Scripps, San Diego, California, Jeffrey G. Carver, San Diego, California, Morris G. Hill, Office of the County Counsel, San Diego, California, for the appellants.

Patrick L. Hosey, Hosey & Bahrambeygui, San Diego, California, for the appellee.

ORDER

The opinion filed on September 27, 2004, and published at *Genzler v. Longanbach*, 384 F.3d 1092 (9th Cir. Sep 27, 2004), is withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted unanimously to deny the petitions for rehearing.

---

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Judges Pregerson and Fletcher have voted to deny the petitions for rehearing en banc, and Judge Cowen so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc, filed by Appellants Longanbach and O'Brien, are **DENIED**.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiff David Genzler seeks damages under 42 U.S.C. § 1983 for violations of his constitutional rights during the investigation and prosecution of his state criminal homicide trial. Defendants San Diego County Deputy District Attorney Peter Longanbach and Investigator Jeffrey O'Brien appeal from the partial denial of their motions for summary judgment based on absolute official immunity. Defendant supervisors in the San Diego County District Attorney's Office – District Attorney Paul Pfingst, Assistant District Attorney Gregory Thompson, and Deputy District Attorney James Pippen – appeal the district court's complete denial of their motion for summary judgment based on absolute and qualified immunity.

We affirm the district court's partial denial of Longanbach's and O'Brien's motions. Evaluating the timing and nature of their conduct, we conclude that there is a genuine issue of material fact about whether they were engaged in advocacy intimately associated with the judicial

process when they interviewed a key witness, Sky Blue Flanders. However, we reverse the district court's denial of the supervisors' motion for summary judgment because we conclude that there is no genuine dispute that their involvement in prosecutorial decisions was advocacy intimately associated with the judicial process.

I. Factual Background

The underlying homicide giving rise to this § 1983 suit occurred on April 18, 1996, when David Genzler stabbed Dustin Harless during a fight. On April 19, Genzler learned from a television news report that Harless had died from the stabbing. Genzler turned himself into the police and was arrested that day. After the arrest, Deputy District Attorney Longanbach and Investigator O'Brien were assigned to the case.

A criminal complaint was filed in Municipal Court on April 23, 1996, and Genzler's bail hearing was held on April 29. On May 23, a preliminary hearing was held in Municipal Court, and the judge found probable cause to bind the case over for trial. The criminal complaint was filed in Superior Court on May 24.

The prosecution filed a pre-trial motion to compel production of evidence from the defense. At the hearing on this motion, Genzler's ex-girlfriend, Sherry Logel, testified under a grant of immunity that she had given a box of bloody clothing and a knife to Gerald Blank, Genzler's retained counsel. Blank said he had received the clothing and given it to the prosecution, but he denied receiving the knife. Longanbach then moved to recuse Blank as Genzler's counsel. At the hearing on this recusal motion, Logel testified that she had lied about delivering the knife to

Blank. The trial judge granted the recusal motion after Longanbach said he planned to call both Logel and Blank as witnesses at Genzler's trial. In a letter she later wrote to Genzler, Logel claimed that Longanbach had pressured her to testify falsely about her communication with Blank.

After trial, a jury convicted Genzler of second degree murder of Harless. This conviction, however, was reversed by the California Court of Appeal on the ground that the trial judge had improperly recused Blank. The Court of Appeal also held that Genzler was entitled to a jury instruction on involuntary manslaughter because there was sufficient evidence to support a finding of imperfect self-defense. Genzler had also alleged prosecutorial misconduct in his first trial, but the Court of Appeal did not reach this issue. The San Diego District Attorney's office recused itself from Genzler's second trial, and Genzler was prosecuted by the State Attorney General's office. On retrial, a second jury found Genzler guilty of involuntary manslaughter.

Sky Blue Flanders, Harless's fiancée, was a key witness for the prosecution in both trials. On the day of the stabbing, Flanders had told the police that Genzler had approached her in his car while she was walking across the street and had asked her if she wanted a ride. According to Flanders, Harless was zipping up his jacket on the other side of the street when Genzler first spoke to her. She told police that Harless had then crossed the street and knocked on Genzler's window. As Flanders described the events to police that day, Genzler got out of the car, Harless and Genzler exchanged punches, Harless "flipp[ed]" Genzler to the ground, and Genzler stabbed Harless while Harless held Genzler on the ground. Flanders also told police that day that Harless was a skilled

wrestler who had been involved in previous street fights. Police audio- and video-taped the interview with Flanders. Flanders testified in a later hearing that she had repeated this version of events – in which Harless was on top of Genzler when Genzler stabbed him – to about 20 other people in the days following Harless's death.

Sometime after Flanders spoke with police on the day of the homicide, she met with Deputy District Attorney Longanbach and Investigator O'Brien. She met once separately with O'Brien sometime during the week before April 29, and once with Longanbach and O'Brien together on April 29. After these meetings, Flanders changed her story. She testified at the preliminary hearing on May 23 and at both trials that she remembered little of the actual fight because she was distracted by the arrival of Scott Davis, the doorman at the bar Flanders and Harless had left just before the stabbing. Flanders further testified that she thought she remembered seeing Davis pulling Genzler off Harless after the stabbing.

In her testimony during Genzler's second trial, Flanders admitted that she had "answer[ed] evasively" in the first trial about whether Harless had ever been involved in past fights and explained that she had tried to answer questions to make it seem that she was only aware of Harless's participation in organized wrestling matches, not of his past history of street-fighting. She also testified in the second trial that she had felt pressure from Longanbach and O'Brien not to disclose Harless's history of street-fighting.

Davis, the doorman, testified at the preliminary hearing and at both trials. In his interview with police the day after the homicide, Davis stated that he saw Genzler

jump out of his car and chase Harless and Flanders as they walked away from him, hand-in-hand. This account was manifestly inconsistent with the account Flanders had given police on the day of the homicide. Davis then met with O'Brien on April 25, and changed his story. In a report summarizing this April 25 meeting, O'Brien wrote that, "upon reflection," Davis considered that he had not seen the couple walking away from him hand-in-hand. At the May 23 preliminary hearing, Davis testified that Flanders and Harless were standing several feet apart when the fight began.

According to Genzler's version of events, the fight on April 18 began when Harless charged Genzler and punched him in the face. Genzler said that Harless had grabbed him, slammed his face to the ground and pinned his arm, and that Davis then began kicking him in the head. Genzler said that he stabbed Harless to defend himself from the attack.

After the second trial, Genzler was sentenced to six years for involuntary manslaughter. With credit for time already served, he was released on February 14, 2001.

II. The Present Action

After his release from prison, Genzler brought the present § 1983 action charging the defendants with prosecutorial misconduct both preceding and during his first trial.[1] The defendants moved unsuccessfully to dismiss Genzler's complaint under Federal Rule of Civil Procedure 12(b)(6).

[1] Because Genzler does not allege conduct that would necessarily imply the invalidity of his conviction after the second trial, this suit is not barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

They then moved for summary judgment based on official immunity. The district court granted Longanbach and O'Brien's motions for summary judgment except for claims based on an allegation contained in paragraph 66 of Genzler's complaint. This paragraph alleges:

> [Longanbach and O'Brien] suborned perjury. Specifically, prior to the preliminary hearing and during the initial investigation of the incident, Longanbach and O'Brien met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past.

The district court read paragraph 66 to state that Longanbach and O'Brien were engaged in an investigative activity when they convinced Flanders to change her version of the events she witnessed. Relying on our opinion in *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), the district court considered not only the nature of the defendants' acts but also their timing, and held that Genzler had produced sufficient evidence to create a genuine issue of material fact as to whether Longanbach and O'Brien had pressured Flanders to lie as part of their initial investigation. The district court accordingly denied this part of their motion.

The supervisory defendants also moved for summary judgment based on absolute and qualified immunity. The district court construed their motion to apply only to allegations contained in three paragraphs of the complaint: paragraphs 74, 81, and 82.[3] These paragraphs

---

[3] The specific allegations are:

> 74. LONGANBACH and O'BRIEN's misconduct did not stop there. On August 22, 1996, at an evidentiary hearing held

(Continued on following page)

charged that Pfingst, Thompson, and Pippen knew that Longanbach had granted Logel immunity in exchange for her perjured testimony, and that they had condoned Longanbach's tactics to force recusal of Genzler's counsel. The district court denied the supervisory defendants' motion in its entirety.

Longanbach, O'Brien, and the supervisory defendants timely appealed. Whether official immunity applies is a question of law we review de novo. *Milstein*, 257 F.3d at 1007. We have jurisdiction over interlocutory denials of motions for summary judgment based on official immunity "to the extent that [the district court's decision] turns on a question of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *see also Wilkins v. City of Oakland*, 350 F.3d 949,

---

before the Honorable Joan P. Weber, LONGANBACH granted prosecution witness, Sherry Logel, immunity in exchange for testimony favorable to the prosecution. This grant of immunity included immunity from perjury and *not just from past acts of perjury, but was intended to cover future acts of lying on the stand at the trial of plaintiff.* In essence, LONGANBACH gave Ms. Logel a "get out of jail free card" for lying on the stand. This was done with the knowledge of PFINGST, THOMPSON and PIPPEN.

81. Neither Mr. Blank nor Ms. Logel were called as trial witnesses by LONGANBACH. It [sic] The entire presentation of false evidence and perjured testimony was nothing but an attempt to remove GENZLER's attorney from the case so as to improperly influence the outcome of the case which LONGANBACH had promised PFINGST, THOMPSON, and PIPPEN he would win.

82. LONGANBACH was excited by the recusal ploy he used. It became one of his favorite tactics. He tried the same tactic in other cases and on other attorneys. PFINGST, THOMPSON and PIPPEN were aware of what he was doing and how he was doing it, but continued to condone and ratify his conduct, because it worked.

951 (9th Cir. 2003) (quoting *Mitchell*). We construe all facts in the light most favorable to Genzler, the non-moving party, in deciding whether a dispute of fact is material and thereby precludes summary judgment. *See Butler v. San Diego County Dist. Attorney's Office*, 370 F.3d 956, 963 (9th Cir. 2004).

III. Discussion

A prosecutor is protected by absolute immunity from liability for damages under § 1983 "when performing the traditional functions of an advocate." *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). However, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Prosecutorial immunity depends on "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. 118 at 127 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Prosecutors are entitled to qualified immunity, rather than absolute immunity, when they perform administrative functions, or "investigative functions normally performed by a detective or police officer." *Id.* at 126. *See also Burns v. Reed*, 500 U.S. 478, 494-96 (1991). For convenience, we shall refer to the latter activities as "police type investigative work."

The Supreme Court has consistently "emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Id.* at 486. Further, "the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87. Finally we note that the Supreme

Court has "been quite sparing in [its] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Id.* at 487 (citations and quotation marks omitted).

To qualify as advocacy, an act must be "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Kalina*, 522 U.S. at 125 (quoting *Imbler*); *Buckley*, 509 U.S. at 270 (same); *Burns*, 500 U.S. at 479 (same); *see also Milstein*, 257 F.3d at 1009 (prosecutorial immunity protects "the prosecutor's actions [that] are closely associated with the judicial process") (citing *Imbler*). Such activity is sometimes called "quasi-judicial" conduct. *E.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1029 (9th Cir. 2003) ("[I]n deciding whether to accord a prosecutor immunity from a civil suit for damages, a court must first determine whether a prosecutor has performed a quasi-judicial function. If the action was part of the judicial process, the prosecutor is entitled to the protection of absolute immunity whether or not he or she violated the civil plaintiff's constitutional rights.") (citation and internal quotation marks omitted). In *Imbler*, the Court observed that absolute "immunity . . . leave[s] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 432. However, the Court explained that absolute immunity for prosecutorial advocacy is justified because, "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest" in protecting the prosecutor's abilities to exercise independent judgment and to advocate vigorously without the threat of retaliation. *Id.* at 429; *see also Milstein*, 257 F.3d at 1007-08. Thus, a prosecutor enjoys absolute immunity from a suit alleging that he

maliciously initiated a prosecution, used perjured testimony at trial, or suppressed material evidence at trial. *Imbler*, 424 U.S. at 430. A prosecutor is also absolutely immune for direct participation in a probable cause hearing, *Burns*, 500 U.S. at 491, and for preparing and filing charging documents, *Kalina*, 522 U.S. at 130.

In *Buckley*, the Supreme Court explored the limits of prosecutorial absolute immunity. The Court denied absolute immunity to prosecutors who had fabricated evidence "during the early stage of the investigation" when "police officers and assistant prosecutors were performing essentially the same investigatory functions." 509 U.S. at 273. The *Buckley* Court also denied absolute immunity to prosecutors accused of holding a defamatory press conference – an activity which "had no functional tie to the judicial process." *Id.* at 277. In other cases, the Court has held that a prosecutor does not have absolute immunity for providing legal advice to police that probable cause exists to arrest a suspect, *Burns*, 500 U.S. at 491, or for personally attesting to the truth of evidence in support of charging documents, *Kalina*, 522 U.S. at 130.

The analysis of whether prosecutorial acts constitute advocacy or police-type investigative work is complicated by the fact that the Supreme Court has resisted any attempt to draw a bright-line between the two. In *Buchanan*, the court noted that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. This might suggest that once probable cause is present, or once an arrest has been made, a prosecutor assumes an advocacy-related role and enjoys absolute immunity. However, in a note appended to the quoted passage, the Court rejected this approach, explaining that "a determination of

probable cause does not guarantee a prosecutor absolute immunity for liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5.

The Court has also rejected the idea that prosecutors are only entitled to qualified immunity when they are engaged in investigation. In *Buchanan*, the Court said that "evaluating evidence and interviewing witnesses" in preparation for trial is advocacy. *Id.* at 273. This is true, notwithstanding the fact that some of the activities a prosecutor takes in preparation for trial, like the interview of witnesses, may be investigatory in nature. The question is whether a prosecutor's investigation is of the type normally done by police, in which case prosecutors enjoy only qualified immunity, or whether an investigation is bound up with the judicial process, thus affording prosecutors the heightened protection of absolute immunity. With this framework in mind, we consider the specific allegations against the defendants.

A. Longanbach and O'Brien

1. Witness Interviews: The Functional Analysis

The claim against Longanbach and O'Brien that survived summary judgment is that "prior to the preliminary hearing and during the initial investigation of the incident . . . [they] met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past." Like the district court, we understand this claim to state that as part of the initial investigation

Longanbach and O'Brien coerced or encouraged Flanders to lie.

Witness interviews may serve either an investigative or an advocacy-related function, as may other methods of gathering or manufacturing evidence prior to trial. *See KRL v. Moore,* 384 F.3d 1105, 1110-16 (9th Cir. 2004) (holding that pre-trial evidence gathering intimately associated with the judicial process was protected by absolute immunity, while evidence gathering for a collateral investigation was not). Viewing the evidence in the light most favorable to Genzler, we must decide whether Longanbach and O'Brien were engaged in an advocacy-related function "intimately associated with the judicial phase of the criminal process" when they met with Flanders, or whether they were engaged in police-type investigative work. *Imbler,* 424 U.S. at 430; *see also Milstein,* 257 F.3d at 1009; *Broam,* 320 F.3d at 1029. If the former, they are absolutely immune. If the latter, they are entitled only to qualified immunity.

If not done in a quasi-judicial capacity, the acquisition or manufacturing of evidence is not protected by absolute immunity. *Milstein,* 257 F.3d at 1011 ("acquiring known false statements from a witness for use in a prosecution is . . . fabricating evidence that is unprotected by absolute immunity"). In *Moore v. Valder,* 65 F.3d 189, 194-95 (D.C. Cir. 1995), the D.C. Circuit held that a prosecutor had not met his burden to show that he was entitled to absolute immunity for acts of intimidating and coercing witnesses into changing their testimony before a grand jury. The court held that such activity constitutes

> a misuse of investigative techniques legitimately directed at exploring whether witness testimony

> is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution.

Id. at 194 (citing *Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987)).

Prosecutors are, however, absolutely immune "for gathering additional evidence after probable cause is established or criminal proceedings have begun *when they are performing a quasi-judicial function.*" *Broam*, 320 F.3d at 1030 (emphasis added). As the Court in *Buckley* explained,

> [t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a police officer, it is neither appropriate nor justifiable that, for the same act, [absolute] immunity should protect the one and not the other.

509 U.S. at 273. A prosecutor gathering evidence is more likely to be performing a quasi-judicial advocacy function when the prosecutor is "organiz[ing], evaluati[ng], and marshaling [that] evidence" in preparation for a pending trial, in contrast to the police-like activity of "*acquiring* evidence which might be used in a prosecution." *Barbera*, 836 F.2d at 100.

The timing of evidence gathering is a relevant fact in determining how closely connected that conduct is to the

official's core advocacy function in the judicial process, and thus informs the inquiry into whether the official's conduct is protected by absolute immunity. The Supreme Court has held that when a witness is being coached at or during a break in trial, the prosecutor is protected by absolute immunity even if he or she is instructing the witness to lie. *Imbler,* 424 U.S. at 430, 431 n.33; *cf. Herb Hallman Chevrolet, Inc. v. Nash Holmes,* 169 F.3d 636, 643 (9th Cir. 1999) (holding that prosecutors were absolutely immune for interviewing new witnesses during investigative grand jury proceedings, when the majority of other witnesses had been interviewed prior to the initiation of proceedings).

Longanbach and O'Brien rely on the timing of their meetings with Flanders to argue that they are entitled to absolute immunity. They point out that their meetings with Flanders occurred after Genzler's April 19 arrest, which Genzler concedes was based on probable cause. However, as we noted above, in *Buckley,* the Court was careful to state that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5. While interviews conducted before probable cause to arrest has been established are not protected by absolute immunity, the converse is not necessarily true. As the district court correctly observed, the courts have only "draw[n] the line in the reverse, stating that absolute immunity could not be invoked before probable cause was established." Indeed, in *Robichaud v. Ronan,* 351 F.2d 533, 535 (9th Cir. 1969), we held that prosecutors who, soon after the arrest of a

suspect, directed police to coerce a confession from that suspect were not entitled to absolute immunity because their activity was more police-like than prosecutorial.

Timing is thus a relevant, but not necessarily determinative, factor. *See KRL,* 384 F.3d at 1111 (citing *Cousin v. Small,* 325 F.3d 627, 636 (5th Cir. 2003)); *see also Kulwicki v. Dawson,* 969 F.2d 1454, 1466 (3rd Cir. 1992). We also focus on whether the character of the meetings was more in the nature of quasi-judicial advocacy or police-type investigative work.

Because Deputy District Attorney Longanbach and Investigator O'Brien were engaged in slightly different functions, we analyze separately their entitlements to absolute immunity. As all parties acknowledge, it is appropriate to focus on the functions performed by Longanbach and O'Brien, not on their titles.

2. O'Brien's Meeting with Flanders Before April 29

Viewing the facts in the light most favorable to Genzler, we conclude that O'Brien was engaged in police-type investigative work, not quasi-judicial advocacy, when he met with Flanders prior to Genzler's bail hearing on April 29, 1996. O'Brien's report indicates that he met with Flanders "several days prior" to April 29. In her testimony during the hearing on Genzler's 2000 motion to dismiss, Flanders estimated that this meeting took place about a week before the April 29 joint meeting with Longanbach and O'Brien. She remembered that she and O'Brien had talked for about an hour, "primarily . . . as to the identity of the person who stabbed [Harless]."

Police investigations were still ongoing. At this time, the preliminary hearing at which the judge would decide whether there was probable cause to hold Genzler for trial in superior court was still over a month away. Moreover, it is a supportable conclusion from the evidence that O'Brien's meeting with Flanders took place before the criminal complaint was filed in municipal court on April 23, 1996, and before police finished their investigation and written synthesis, which is dated April 24, 1996. *See Kulwicki*, 969 F.2d at 1465 (noting that filing of a criminal complaint is a relevant but not dispositive factor in determining whether an interview involves investigation or advocacy).

The written police synthesis leaves out the initial statement by Flanders to police that Harless was on top of Genzler at one point during the fight. It emphasizes Davis's point of view, but it does not include Davis's story that Flanders and Harless were walking hand-in-hand. If all factual inferences are resolved in favor of Genzler, one could conclude that O'Brien used this interview to change Flanders's story about what she remembered and to make her story more consistent with Davis's story.

Further, the record reflects that during this period, O'Brien was engaged in other work that can only be characterized as police-type investigation. For example, he and Longanbach interviewed Scott Davis on April 25, 1996. The notes from the conversation reflect only a narrative from Davis's point of view about the events of the stabbing. O'Brien joined police Detective Warrick in a meeting on June 3, 1996 with Sherry Logel, Genzler's ex-girlfriend, discussing her story about giving Genzler's knife to Blank, and Genzler's character in general. This conversation, too, was police-type investigative work, as

indicated by the nature of the information obtained and by the presence of Detective Warrick. On June 5, 1996, O'Brien interviewed Paul Ernst, another witness to the homicide, about what he had seen. Similarly, on June 28, 1996, O'Brien met again with John Belsan, who came forward with evidence about a past fight with Genzler. Again, O'Brien's notes from this conversation reflect only Belsan's narrative about what happened in that confrontation. That O'Brien was engaged in police-type investigative work during the time he met with Flanders supports an inference that he was also engaged in such work when he met with her.

We conclude from the foregoing that there is sufficient evidence in the record to support the conclusion that, during his first meeting with Flanders, O'Brien was, like the prosecutor in *Moore*, engaged in the process of acquiring or manufacturing evidence during performance of police-type investigative work, rather than engaged in quasi-judicial advocacy. At this stage of the proceedings, O'Brien is therefore unprotected by absolute immunity.

Absolute immunity does not protect Longanbach if he was directing this police-type investigative activity by O'Brien. *See Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986) ("a prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court") (citation and internal quotation omitted); *Robichaud*, 351 F.2d at 537 (holding that prosecutors are not absolutely immune if they either "committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity");

cf. Burns, 500 U.S. at 496 (prosecutor not entitled to absolute immunity for act of giving legal advice to police). Longanbach cannot, however, be liable for O'Brien's conduct on a theory of vicarious liability for any independent actions taken by O'Brien. *See Monell v. Dep't of Social Servs. of NY*, 436 U.S. 658, 691 (1978) (respondeat superior not available as theory of liability under § 1983).

There is sufficient evidence in the record to support the conclusion that Longanbach was actively directing O'Brien throughout his work on the Genzler case, including O'Brien's first meeting with Flanders. For example, Flanders testified that Longanbach would give her instructions that O'Brien would then "reiterate." Genzler also introduced a declaration from another Deputy District Attorney stating that "Jeff O'Brien does whatever Mr. Longanbach told him to do." Because the evidence could support a conclusion that Longanbach was actively directing police-type investigative actions by O'Brien, Longanbach is also not entitled to summary judgment that he is absolutely immune for any action taken with respect to O'Brien's meeting with Flanders before April 29.

3. Longanbach and O'Brien's April 29 Meeting with Flanders

The next question is whether Longanbach and O'Brien were engaged in police-type investigative work or quasi-judicial advocacy in their joint April 29 meeting with Flanders.

We consider first the timing of the conversation. The criminal complaint had been filed by the time of Longanbach and O'Brien's April 29 meeting with Flanders. However, just as the existence of probable cause to arrest

is not conclusive, we do not view the filing of the complaint as an event after which, by definition, all actions by the prosecutor and his staff are protected by absolute immunity. The timing of the April 29 meeting does not weigh as much in favor of absolute immunity as did the timing of the search carried out pursuant to a warrant in *KRL*, 384 F.3d at 1111-13. In *KRL*, we held that a prosecutor and his investigator were entitled to absolute immunity for seeking a search warrant and carrying out a search pursuant to that warrant more than three weeks after the grand jury returned an indictment indicating that it had found sufficient evidence for the defendant to stand trial. *Id.* When Longanbach and O'Brien met with Flanders, the preliminary hearing at which the court would determine whether there was probable cause for Genzler to stand trial was still more than three weeks away. On April 29, officials were continuing the process of investigation into the facts that would inform whether there was such probable cause, and the precise charges on which Genzler would stand trial had yet to be determined.

We next consider the nature of the interview with Flanders. The Supreme Court has stated that

> acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the court of his [or her] role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include *the professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial* or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. at 273 (emphasis added); *see also Broam*, 320 F.3d at 1030. In *KRL*, we held that "to the extent that the second search warrant sought evidence to prosecute the crimes charged in the indictment," the prosecutors' authorization of that warrant and an investigator's subsequent search were protected by absolute immunity. 384 F.3d at 1112, 1118. We held that the prosecutors and the investigator were acting as advocates to the extent they were reviewing, evaluating, and ensuring the admissibility of evidence in preparation for an already pending trial. *Id.*

There is some evidence in the record that Longanbach and O'Brien were reviewing and evaluating evidence at the April 29 meeting in preparation for the preliminary hearing and trial testimony, including some testimony by Flanders describing the meeting at some of the later proceedings in Genzler's case. However, when we resolve all ambiguity in favor of Genzler and view the evidence in the context of other evidence about ongoing investigations, we conclude that evidence in the record supports the conclusion that Longanbach and O'Brien were engaged in police-type investigative work during the meeting.

The only notes in the record from the meeting were taken by O'Brien. They are captioned, "Witness Interview." These interview notes, like notes taken of other interviews by O'Brien, record only a narrative of what Flanders reportedly said at the meeting about the events of April 17 and April 18. The notes state that "FLANDERS had told me during a conversation that took place at her residence several days earlier that she had a clearer picture in her mind of the events surrounding HARLESS' death. She felt that she could relate them in a more organized fashion than she may have done earlier in the investigation."

Specifically, the notes state that Flanders was "distracted" by the arrival of Scott Davis, which is inconsistent with the initial statement Flanders made to police. The notes thus reflect that Longanbach and O'Brien were in the process of gathering information from Flanders during the meeting and possibly encouraged her to lie as part of their process.

The Fifth Circuit decision in *Cousin*, relied on heavily by Longanbach and O'Brien, is therefore inapposite. In *Cousin*, the Fifth Circuit held that a declaration by a witness who was allegedly coerced and intimidated into lying "eliminate[d]" any "ambiguity" about whether the prosecutor was engaged in an investigatory or quasi-judicial function when he interviewed that witness. 325 F.3d at 633. The declaration clearly showed that when the prosecutor met with the witness, "he did so to tell [the witness] how he should testify." *Id.* Here, by contrast, the interview notes show a process of police-type investigation – or, viewed in the light most favorable to Genzler, a process of manufacturing evidence while performing an police-type investigative work – not Longanbach or O'Brien acting as advocates by actively preparing Flanders for her testimony in court. *See Moore*, 65 F.3d at 194.

We therefore agree with the district court that Longanbach and O'Brien are not entitled to summary judgment that they are absolutely immune for their actions during the April 29 meeting with Flanders.

4. Summary

A prosecuting attorney may perform many roles, or functions. *See Robichaud*, 351 F.2d at 537 (citing Edward L. Barrett, Jr., *Police Practices and the Law – From Arrest*

to Charge, 50 Cal. L. Rev. 11, 16-24 (1962)). Not all of these roles are protected by absolute immunity. *See Robichaud*, 351 F.2d at 537 ("The distinction between the roles may be significantly controlling."). We recognize that the two meetings with Flanders described here were to some degree related to trial preparation, even when viewed in the light most favorable to Genzler. The Supreme Court has cautioned, however, that "[a]lmost any action by a prosecutor, including his or her participation in purely investigative activity, could be said to be in some way related to the ultimate decision to prosecute, but we have never indicated that absolute immunity was that expansive." *Burns*, 500 U.S. at 495-96. We therefore remain focused on the question whether the prosecutor's actions are "*intimately associated with the judicial phase of the criminal process.*" *Id.* at 487 (emphasis added) (quoting *Imbler*, 424 U.S. at 430). We do not read the record here, resolving all ambiguity in favor of Genzler, to indicate such a close association between Longanbach and O'Brien's actions in their witness interviews with Flanders, on the one hand, and the judicial phase of Genzler's criminal trial, on the other, to entitle them to summary judgment that they are absolutely immune for those actions. We therefore affirm the district court's partial denial of summary judgment to Longanbach and O'Brien.

B. The Supervisory Defendants

The next issue is whether Pfingst, Thompson, and Pippen – the supervisory defendants – are entitled to absolute immunity. The district court understood the supervisory defendants to have moved for summary

judgment on only three allegations in Genzler's complaint, specifically paragraphs 74, 81, and 82.[3] The district court did not view the motion as including any other allegations against the supervisory defendants in Genzler's complaint, and its ruling did not extend to any such allegations. We construe the supervisory defendants' motion for summary judgment as did the district court.

We reverse the district court's denial of summary judgment with respect to the allegations contained in these three paragraphs. We apply the "function test" to determine whether the supervisory defendants are entitled to absolute immunity. *Roe v. City and County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997). To decide whether absolute immunity applies, we assume without deciding that Genzler has alleged a deprivation of a constitutional right under § 1983. *See Buckley*, 509 U.S. at 261.

The relevant paragraphs state (1) that the supervisory defendants knew that Longanbach had granted Logel immunity in exchange for perjured testimony favorable to the prosecution; (2) that Longanbach had promised the supervisory defendants he would win Genzler's case; and (3) that the supervisory defendants were aware of and condoned a ploy to use Logel's perjured testimony to force the recusal of Genzler's counsel of choice. Each of these statements describes conduct closely related to prosecutorial decisions in the trial phase of Genzler's case. These actions all involve advocacy "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, for which the supervisory defendants are

[3] *See supra* pages 6473-74, n.2.

entitled to absolute immunity. *See id.* at 431 (presenting perjured testimony protected by absolute immunity); *Mullinax v. McElhenney*, 817 F.2d 711 (11th Cir. 1987) (offering a witness immunity in exchange for testimony protected by absolute immunity); *see also Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir. 1985) (holding that a prosecuting attorney and his supervisor had absolute immunity "for their actions in prosecuting a case against" a defendant).

Conclusion

We affirm the district court's partial denial of summary judgment as to Longanbach and O'Brien. We reverse the district court's denial of summary judgment as to Pfingst, Thompson, and Pippen. We express no opinion about whether Genzler has stated a violation of a constitutional right that is actionable under 42 U.S.C. § 1983, or whether the defendants may be entitled to qualified immunity. We leave these determinations to the district court in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID GENZLER,

Plaintiff,

vs.

PETER LONGANBACH, an individual; JEFFREY O'BRIEN, an individual; GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 01CV1462 K JAH

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LONGANBACH'S MOTION FOR SUMMARY JUDGMENT [44]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS PFINGST'S, THOMPSON'S, O'BRIEN'S, AND PIPPEN'S JOINT MOTION FOR EARLY SUMMARY JUDGMENT [47]

(Filed Aug. 13, 2002)

The Court considers two motions for summary judgment filed on June 11, 2002, by (i) Deputy District Attorney Peter Longanbach, and (ii) San Diego County District Attorney Paul Pfingst, Deputy District Attorney Gregory Thompson, Deputy District Attorney James Pippen, and Jeffrey O'Brien, an investigator employed by the DA's Office (together, the "Individual Defendants"). Plaintiff opposes both motions. All parties proceed through counsel.

This case arises from an altercation in 1996 between Plaintiff and Dusty Harless, which resulted in Dusty Harless' death. Plaintiff alleges that prosecutorial misconduct lead to his state court conviction for second degree

murder on February 10, 1997. Following reversal and retrial, Plaintiff was convicted of involuntary manslaughter on August 25, 2000. Plaintiff sues each Defendant in his individual and official capacity for (i) violations of civil rights under 42 U.S.C. § 1983 and (ii) conspiracy to violate civil rights under 42 U.S.C. § 1983.

I. Applicable Legal Standards

Because Defendants' two separate motions each rely on the same legal standards for summary judgment and absolute prosecutorial immunity, the Court provides those standards at the outset.

A. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if a dispute over it "might affect the outcome of the suit under governing law. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment will not be granted if the dispute is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant has the initial burden of demonstrating that summary judgment is proper. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment

is not appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To make such a showing, the nonmovant must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *See id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

B. Absolute Prosecutorial Immunity

In *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), the Ninth Circuit surveyed the law governing absolute prosecutorial immunity. The Court quotes heavily from the *Milstein* decision as it provides the controlling Ninth Circuit framework for analyzing Defendants' motions insofar as they are based upon absolute prosecutorial immunity.

According to the Ninth Circuit:

> The text of 42 U.S.C. § 1983, which establishes a federal cause of action for the violation of federal rights by state officials, contains no exceptions. However, the Supreme Court has attributed to the Congress that passed § 1983 knowledge of then-existing common-law immunities, and the lack of an explicit abrogation of these immunities has been interpreted as preserving them.
>
> The immunity of a prosecutor is based upon the same purpose that underlies the immunity of judges and grand jurors acting within the scope of their duties: to protect the judicial process. Specifically, absolute immunity for prosecutors is warranted (1) to allow prosecutors to focus their

> energies on prosecuting, rather than defending lawsuits; (2) to enable prosecutors to exercise independent judgment in deciding which suits to bring and conducting them in court; (3) to preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant (although sometimes conflicting) evidence because of prosecutors' fear of suit; and (4) to ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that such rulings could subject the prosecutor to liability. . . .
>
> The seminal case on absolute immunity for prosecutors is *Imbler v. Pachtman*, where the Supreme Court held that "in initiating a prosecution and in presenting the State's case," the prosecutor is immune from a civil suit for damages under § 1983. This immunity covers the knowing use of false testimony at trial, the suppression of exculpatory evidence, and malicious prosecution. The Court reasoned that these activities are "intimately associated with the judicial phase of the criminal process." The Court acknowledged that at some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator or investigator rather than as an officer of the court. . . .
>
> Additionally, the Court announced a line before which absolute immunity could not apply: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Milstein, 257 F.3d at 1007-1010 (internal citations omitted).

II. Discussion of Defendant Longanbach's Motion for Summary Judgment

A. Absolute Prosecutorial Immunity

The allegations against Defendant Longanbach upon which he moves for summary judgment fall into the following four categories: (i) hiding and/or withholding evidence (Complaint at ¶¶ 16, 58, 62, 71, 86); (ii) presenting false testimony to the jury (Complaint at ¶¶ 70, 74, 75, 80, 81, 87, 89); (iii) tampering with recorded witness statements and investigative reports (Complaint at ¶¶ 56, 62, 68, 88); and (iv) tampering with and threatening witnesses and suborning perjury (Complaint at ¶¶ 59, 66, 69, 75, 78, 94). Motion at 5-6.

Defendant Longanbach categorically denies each of these allegation. Assuming the allegations are true, however, he initially presents the summary argument that he is absolutely immune from each of them because they each occurred after Plaintiff had been arrested, and thus probable cause had already been established. Therefore, he argues, the initial investigation into the killing was complete and he was acting as an advocate for the state for which immunity attaches, and not as an investigator or detective for which only qualified immunity attaches. Motion at 6. At the outset, the Court rejects this summary argument. It is true, as quoted above, that the Ninth Circuit rule is that "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Milstein*, 257 F.3d at 1010 (*citing Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993)). However, this holding is not that any activity undertaken by a prosecutor after an arrest based upon probable cause is advocatory and thus protected by absolute immunity. To the contrary, the Ninth Circuit was drawing the line in the

reverse, stating that absolute immunity could not be invoked before probable cause was established. *Id.* The possibility thus exists that some actions undertaken by a prosecutor after the establishment of probable cause could be unprotected by absolute immunity.

This conclusion is consistent with the Supreme Court dicta from *Buckley*:

> Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity . . . for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity. . . ."

Buckley, 509 U.S. at 2616, n.5. The Court therefore rejects Defendant Longanbach's initial summary argument and discusses each category of allegation against Defendant Longanbach in turn.

1. Hiding and/or Withholding Evidence

Defendant Longanbach argues that the following allegations, if proven, would clearly be prosecutorial, not investigatory, in nature, and thus subject to absolute immunity: (i) hiding evidence, Complaint at ¶ 16; (ii) planning to keep exculpatory information, evidence and documents, to which Genzler's attorneys were entitled, from Genzler's attorneys, Complaint at ¶ 58; (iii) hiding or withholding large amounts of potentially exculpatory evidence until the eve of or after the preliminary hearing, Complaint ¶ 62, 71; and (iv) hiding a police incident report relating to an alleged 1993 incident between Plaintiff and a prosecution witness in Plaintiff's first trial which Plaintiff claims would have aided in his defense, Complaint at ¶ 86.

Defendant Longanbach argues that in *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), the Supreme Court held that allegations regarding the suppression of exculpatory evidence are subject to absolutely immune as such suppression is "intimately associated with the judicial phase of the criminal process." He similarly argues that the suppression of exculpatory evidence is covered by absolute immunity under *Milstein*, 257 F.3d at 1008. Upon review of these controlling cases, the Court agrees, and holds that even if proven, Defendant Longanbach is absolutely immune from Plaintiff's allegations that he "hid and/or withheld" evidence, because these allegations are substantively equivalent to the "suppression" of evidence claims held by the Supreme Court to be subject to absolute prosecutorial immunity. In *Imbler*, the suppressed evidence consisted of exculpatory fingerprint evidence and an exculpatory lie detector test. *Imbler*, 424 U.S. at 416. Such exculpatory evidence is similar to the exculpatory evidence Plaintiff currently claims was unlawfully hidden or withheld. Moreover, the Ninth Circuit has recently reiterated this aspect of the *Imbler* holding, stating that under *Imbler*, absolute prosecutorial immunity covers "the suppression of exculpatory evidence." *Milstein*, 257 F.3d at 1008. Defendant Longanbach's motion for summary judgment as to Plaintiff's claims regarding the hiding and/or withholding of evidence contained in the Complaint at ¶¶ 16, 58, 62, 71, 86 is therefore **GRANTED**.

2. Presenting False Testimony to the Jury

Defendant Longanbach argues that Plaintiff's claims that he presented false testimony to the jury, if proven, is covered by absolute immunity under *Imbler*, 424 U.S. at 416, 431. The specific allegations at issue are that Defendant

Longanbach: (i) knew that certain witness testimony as to past aggressive conduct by Dusty Harless would be inculpatory and therefore pressured the witness to provide such testimony even though he knew it was dishonest, Complaint at ¶ 70; (ii) granted a prosecution witness immunity in exchange for testimony he knew was perjured and favorable to the prosecution, which immunity shielded the witness from prosecution for perjury and for future acts of lying on the stand at Plaintiff's trial, Complaint ¶ 74, 75, 80, 81; and (iii) suborned perjured testimony regarding a prior violent act committed by Plaintiff, Complaint at ¶ 87, 89.

Defendant Longanbach's argument is correct in that the Supreme Court held in *Imbler,* 424 U.S. at 416, that when a witness gives false testimony, absolute immunity attaches to a prosecutor's intentionally and negligently allowing it. Moreover, the Ninth Circuit has recently reiterated this aspect of the *Imbler* holding, stating that under *Imbler,* absolute prosecutorial immunity covers "the knowing use of false testimony at trial." *Milstein,* 257 F.3d at 1008. Defendant Longanbach's motion for summary judgment as to Plaintiff's claims regarding the presentation of false testimony to the jury contained in the Complaint at ¶¶ 70, 74, 75, 80, 81, 87, 89 therefore **GRANTED**.

3. Tampering with Recorded Witness Statements and Investigative Reports

Defendant Longanbach argues that Plaintiff's allegations that he tampered with recorded witness statements and investigative reports, if proven, are subject to absolute immunity because he carried out these activities in an advocatory rather than an investigatory role. Specifically,

the allegations in question are that Defendant Longanbach: (i) had the District Attorney's investigative report destroyed and redrafted deleting any reference to Dusty Harless' prior physical conflicts or any other potentially exculpatory evidence/information, Complaint at ¶ 56; (ii) had tapes of witness testimony tampered with, Complaint at ¶ 62; and (iii) used his position to remove the only available copies of a certain crime/incident report from the San Diego Police Department which prejudiced Plaintiff, Complaint at ¶ 88. Defendant Longanbach also includes Complaint ¶ 68 in this category, but that paragraph does not allege tampering with recorded statements or investigative reports and is, therefore not considered.

Defendant Longanbach relies on *Imbler* in making this argument. In *Imbler,* the plaintiff had accused the prosecutor/defendant of using "at trial a police artist's sketch of [the killer] made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused on him." *Imbler,* 424 U.S. at 416. The Supreme Court found the prosecutor/defendant absolutely immune from this allegation as the alleged action was "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Plaintiff argues in opposition that *Imbler* is factually distinguishable because in "that case the defendant prosecutor did not himself nor did he instruct anyone to manipulate the police artist's sketch. He had no part in the alleged tampering of evidence. Rather, he was accused of using the altered sketch in the trial." Opposition at 14. The Court agrees with Plaintiff's argument that the *Imbler* facts were prosecutorial because they related to the prosecutor's actual use of the sketch at trial; those facts do not suggest that a prosecutor who himself tampers with recorded witness

statements and investigative reports, or orders such tampering, is entitled to absolute immunity for those actions. In the absence of a showing of any other law suggesting absolute prosecutorial immunity for these alleged acts, the Court **DENIES** Defendant Longanbach's motion for summary judgment as to the allegations relating to tampering with recorded witness statements and investigative reports contained in the Complaint at ¶¶ 56, 63, 68 (see note above), and 88, based upon absolute immunity.

4. Tampering with Witnesses and Suborning Perjury

Defendant Longanbach argues that Plaintiff's allegations relating to witness tampering and suborning perjury are subject to absolute prosecutorial immunity. These allegations differ from those in category (ii), "presenting false testimony to the jury." Unlike the knowing presentation of false testimony, these allegations involve the actual suborning of false testimony.

These allegations are also analytically distinguishable from those in category (iii), "tampering with recorded witness statements and investigative reports," even though both categories seemingly deal with the fabrication of evidence. The category (iii) allegations dealt with tampering and alteration of physical evidence, a subject about which no case law has been presented. The category (iv) allegations, with the exception of one, deal with acquiring known false statements from witnesses after probable cause has been established, which has been discussed by the Supreme Court and the Ninth Circuit, as discussed below.

The allegations Defendant Longanbach places at issue are as follows: (i) that while investigating the case, he coerced and bullied witnesses into changing their testimony related to what occurred on the night of the incident, Complaint at ¶ 59; (ii) that he suborned perjury by meeting with a witness prior to the preliminary hearing and during the initial investigation of the incident, telling her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past, Complaint at ¶ 66; (iii) that the same witness was told to testify falsely about having actually seen Mr. Harless in prior street or bar fights and about her knowledge thereof, Complaint at ¶ 69; (iv) that he specifically directed another witness to perjure herself regarding the murder weapon, Complaint at ¶ 75; (v) that the same witness lied because she was threatened by Defendant Longanbach that if she didn't falsely testify, Defendant Longanbach would send her to jail and take away her children, Complaint at ¶ 78; and (vi) that Defendant Longanbach, in an effort to explain the degradation of DNA evidence in blood stains on Plaintiff's shirt, wanted to argue that Plaintiff himself washed the shirt to cover up the crime, and therefore suggested that the investigating police officer leave rain out of the written description of the weather conditions on the evening of the incident, Complaint at ¶ 94.

In opposition, Plaintiff argues that in *Milstein*, 257 F.3d at 1011, the Ninth Circuit held that a prosecutor would not be entitled to absolute immunity if it can be demonstrated that he knowingly obtained false statements for the purpose of prosecution. In so holding, the Ninth Circuit stated that absolute immunity does not attach to allegations that prosecutors knowingly *obtained* false

statements for the purpose of prosection. *Id.* The Ninth Circuit analogized from the Supreme Court's holding in *Buckley,* reasoning that just as the Supreme Court held that shopping for a dubious expert opinion is fabricating evidence unprotected by absolute immunity, so is acquiring known false statements from a witness for use in a prosecution. *Id.* Plaintiff asks this Court to similarly analogize that the acts he alleges of suborning perjury are akin to fabricating evidence, unprotected by absolute immunity.

The Court recognizes the similarities of the allegations. However, the Court cannot ignore that the subject activities in both *Milstein* and *Buckley* occurred well before the empaneling of a grand jury, and thus well before probable cause had been established, and that both the *Milstein* and *Buckley* courts relied heavily on such circumstance in characterizing the actions as investigatory and in denying absolute immunity for those claims. *Milstein,* 257 F.3d at 1011 and *Buckley,* 509 U.S. at 275-76 (prosecutor's fabrication of evidence occurred during the preliminary investigation of an unsolved crime). Here, only allegation (ii), Complaint ¶ 66, specifically avers that the suborning of perjury occurred "prior to the preliminary hearing." Thus, the acts alleged in ¶ 66 occurred prior to the establishment of probable cause and are not subject to absolute immunity.

Each of the other allegations in this category appears to relate to actions which occurred once the investigative detective work was done, probable cause was established, and Defendant Longanbach was preparing for trial. The Court therefore holds that absolute immunity attaches to those allegations in this category which occurred once probable cause had been established and **GRANTS**

Defendant Longanbach's motion for summary judgment as to the allegations regarding suborned perjury contained in the Complaint at ¶¶ 59, 69, 75, 78, 94. However, the Court **DENIES** summary judgment on absolute immunity grounds as to the allegations contained in the Complaint at ¶ 66.

B. Genuine Issue as to Any Material Fact

Defendant Longanbach alternatively argues that regardless of whether he is entitled to absolute immunity, Plaintiff is in any case unable to provide any evidence to support his claims of wrongdoing and summary judgment must therefore be granted in his favor. Motion at 10. Because the Court grants Defendant Longanbach's motion as to Plaintiff's allegations under categories one, two and four, above, with the exception of the allegations contained in the Complaint at ¶ 66, the Court discusses summary judgment only as to the allegations under category three and Complaint ¶ 66.

For purposes of summary judgment, Defendant Longanbach may meet his burden of showing the absence of a genuine issue of material fact by showing to the district court that there is an absence of evidence to support the nonmovant's case. *Fairbanks v. Wunderman Cato Johnson,* 212 F.3d 528, 531 (9th Cir. 2000) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). "Once the moving party has met its initial burden; Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* (internal citations omitted). To this end, Defendant Longanbach simply argues that Plaintiff has no evidence, and

that no evidence exists, to support the following three allegations:

1. Complaint ¶ 56

This paragraph and those around it allege that Longanbach ordered O'Brien to destroy his initial investigatory report and redraft it deleting any reference to Mr. Harless' prior physical conflicts or any other potentially exculpatory evidence or information. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that "Longanbach ordered O'Brien to destroy the report and redraft it deleting any reference to prior physical conflicts or any other potentially exculpatory evidence/information. . . . O'Brien did as he was told, later stating that he works for Longanbach and 'my job is to do what he tells him to do.'" Opposition at 5. In support of these factual assertions, Plaintiff relies upon his statement of disputed material fact ("DMF"), ¶¶ 20-21.

Those paragraphs refer to case notes prepared by another District Attorney Office employee, Rebecca Blair-Hartunian, which state that when she expressed surprise to O'Brien upon hearing him speak about the subject exculpatory evidence/information, "O'Brien replied that [Longanbach] had told him not to put it into the report." Exhibit 12 at 100118. Although this information appears to raise a genuine issue of triable fact as to the subject report, and might normally be admissible into evidence as an admission against penal interest, Defendant Longanbach objects on evidentiary ground to the Blair-Hartunian notes pursuant to Fed.R.Evid. 801 & 802 (Hearsay), 805 (Hearsay within Hearsay), and 901 (Authentication). The

Court agrees with the objection based upon Rule 901 because Plaintiff provides no authentication whatsoever of the purported case notes. The Court therefore **GRANTS** Defendant Longanbach's evidentiary objections to this exhibit and **GRANTS** his motion for summary judgment as to Plaintiff's claims regarding the subject report.

2. Complaint ¶ 63

This paragraph and those around it allege that a tape of witness testimony had been tampered with by Defendants Longanbach and O'Brien. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that "Longanbach and O'Brien received the tape shortly after it was created – and now the first half of it was missing." Opposition at 7. Here, Plaintiff relies on DMF ¶ 27, which cites to Plaintiff's exhibits 35, 40, 41 and 42. Each of these paragraphs provides testimony or declarations that there was a tape recorder present at the subject witness interview, and that it appeared that the interviewing detective pressed the record button when he began the interview, and flipped the tape during the interview. However, none of this evidence, some of which Defendant Longanbach objects to, provides any evidence that either Defendant Longanbach or O'Brien erased the tape. The Court therefore **GRANTS** Defendant Longanbach's motion for summary judgment as to the allegations relating to the cassette tape.

3. Complaint ¶ 66

This paragraph alleges that Defendant Longanbach suborned perjury by meeting with a witness prior to the preliminary hearing, telling her that in order to secure a

conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff relies on DMF ¶ 28, which purports to summarize the evidence offered in support of his allegation that Defendant Longanbach coerced her into committing perjury. This evidence consists largely of a transcript of the sworn testimony of the subject witness concerning her experience with Defendants Longanbach and O'Brien prior to the preliminary hearing. The testimony includes various statements that she felt pressured by these Defendants, as well as by the victim's family, to lie about what she saw on the night of the incident and about Mr. Harless' violent past. The Court finds that this evidence is a sufficient showing of fact to raise a genuine issue for trial, and therefore **DENIES** Defendant Longanbach's motion for summary judgment as to the allegations contained in the Complaint at ¶ 66, relating to Defendants Longanbach and O'Brien having unlawfully coerced the witness into testifying falsely prior to the preliminary hearing.

4. Complaint ¶ 88

This paragraph and those around it allege that during the 1996 trial, the defense (Plaintiff herein) tried to subpoena a police report (the "Belsan" report) from the San Diego Police Department concerning Plaintiff, which report would have weakened certain prosecution testimony regarding an alleged past violent act committed by Plaintiff. Plaintiff alleges that in response to the subpoena, the defense received a Certification of No Records, and that therefore Longanbach and O'Brien used their positions to remove the only available copies of a past

incident report involving Plaintiff during his first trial, thereby prejudicing him and preventing him from obtaining a fair trial.

In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that the report in question "was eventually disclosed to Genzler by the AGO. That document contains a fax confirmation line which indicates that the report was faxed to the 8th floor of the Hall of Justice, on June 4, 1996." Opposition at 8. Plaintiff relies upon DMF ¶ 44 which references his Exhibits 52 and 74. These exhibits, which Defendant Longanbach objects to, would demonstrate that the subject report might have been faxed to Defendant O'Brien during the 1996 proceeding, and that the report existed during the 1999 proceeding. Assuming these exhibits could withstand Defendant Longanbach's objections, they do not provide evidence that Defendants Longanbach or O'Brien "removed the only available copy" of the report. If O'Brien received a fax of the report, an original must have existed as well. The Court therefore **GRANTS** Defendant Longanbach's motion for summary judgment as to the allegations regarding the "Belsan" report.

III. Discussion of Individual Defendants' Motion for Summary Judgment

In contrast to Defendant Longanbach's motion, the memorandum in support of the Individual Defendants' motion is not specific as to which of Plaintiff's allegations they move for summary judgment, nor as to the specific grounds upon which they move as to each challenged allegation. The Individual Defendants appear to move

initially for "dismissal based on absolute or, alternatively, qualified immunity from liability in their individual capacities." Motion at 1. However, despite their broad request for "dismissal" on summary judgment, as best as the Court can ascertain from the pleadings, the Individual Defendants move for summary judgment based upon immunity only as it applies to the allegations against them contained in the Complaint at ¶¶ 52 through 94. Motion at 8. Upon examination of those paragraphs, the Court discerns 12 paragraphs which make specific allegations against Defendant O'Brien (Complaint at ¶¶ 57, 58, 59, 61, 64, 66, 70, 74, 83, 84, 88) and three paragraphs which make specific allegations against the other Individual Defendants (Complaint at ¶¶ 74, 81, 82). The Individual Defendants alternatively ask for summary adjudication of a list of 44 facts contained in their Notice of Motion at p.2-5 which they allege without any argument whatsoever are without substantial controversy. Motion at 2.

The Court will first discuss the Individual Defendants' immunity arguments as they apply to the specified allegations, and will then address their alternative request for adjudication of facts without substantial controversy.

1. Specific Allegations Against Defendant O'Brien

The allegations at issue against Defendant O'Brien can be broken down into the same categories as those described above: (i) hiding and/or withholding evidence (Complaint at ¶¶ 58, 61); (ii) presenting false testimony to the jury (Complaint at ¶¶ 70, 74, 83, 84); (iii) tampering with recorded witness statements and investigative reports (Complaint at ¶¶ 57, 58, 64, 88); and (iv) tampering with

and threatening witnesses and suborning perjury (Complaint at ¶¶ 59, 66, 83, 84).

Each of these allegations is discussed above. The sole question on this issue is whether absolute immunity as applied to Defendant O'Brien, an investigator employed by the District Attorney's office, is coextensive with its application to Defendant Longanbach. The Individual Defendants provide little legal argument on this point. They accurately state that "[o]f the four [Individual Defendants], only one, O'Brien, personally participated in [Plaintiff's] prosecution," and that "[i]nvestigators, like prosecutors and others helping to present the state's case, are entitled to prosecutorial immunity when engaged in functions intimately associated with the judicial phase of the criminal process." *See Cooper v. Parrish*, 203 F.3d 937, 950 (6th Cir. 2000)." Motion at 13.

Plaintiff's opposition is similarly devoid of persuasive argument on this point. Plaintiff's sole theory is that Defendant O'Brien should not be vested with absolute prosecutorial immunity for acts which disqualify Defendant Longanbach from such immunity. Insofar as the Court holds that those actions alleged to have been undertaken by Defendant Longanbach in categories one, two and four are protected by absolute immunity, this argument is without merit. The argument actually urges the Court to apply the same absolute immunity argument to Defendant O'Brien as it did to Defendant Longanbach. The Court will do so. Simply because Defendant O'Brien is labeled an "investigator" does not mean that his actions, allegedly taken pursuant to the direct orders of prosecutor Longanbach, are de facto "investigatory" in nature. On the contrary, logic dictates that because the actions are identical to those alleged against Defendant Longanbach the

Court should apply its holding equally. The Court therefore **GRANTS** Defendant O'Brien's motion as to the allegations listed above under categories one, two and four, with the exception of the allegations contained in the Complaint at ¶ 66, and **GRANTS** Defendant O'Brien's motion for summary judgment as to the allegations under category three as discussed above.

2. Specific Allegations Against Other Individual Defendants

The remaining Individual Defendants move for summary judgment upon the allegations contained in the Complaint at ¶¶ 74, 81, 82. Those allegations are that Defendants Pfingst, Thompson and Pippen, who supervised Defendant Longanbach but were allegedly not directly involved in Plaintiff's prosecution: (i) knew that Defendant Longanbach granted a prosecution witness immunity in exchange for perjured testimony favorable to the prosecution, which immunity shielded the witness from prosecution for perjury and for future acts of lying on the stand at Plaintiff's trial, Complaint ¶ 74; (ii) had been promised by Defendant Longanbach that he would secure a conviction, Complaint at ¶ 81; and (iii) were aware of and condoned Defendant Longanbach's ploy to get Plaintiff's attorney to recuse himself, complaint at ¶ 82. To their detriment, Defendants Pfingst, Thompson and Pippen offer absolutely no argument or legal authority to support the proposition that absolute prosecutorial immunity applies to supervisors in the prosecutor's office for the alleged acts of a prosecutor. They similarly neglect to provide any particularized argument or legal authority as to how the Court should apply witness immunity or qualified immunity to them in their supervisory role.

Because they have failed to provide any argument or authority on these dispositive issues, their motions are **DENIED**.

3. Adjudication of Fact Without Substantial Controversy

Similarly, because (i) the Individual Defendants provide absolutely no argument in support of their request for summary adjudication, instead simply listing 44 facts and alleging they are without substantial controversy, and (ii) for purposes of summary judgment, they have the initial burden of showing the Court that there is an absence of evidence to support the nonmovant's case and have failed to meet this burden, (iii) the Court **DENIES** their motion for summary adjudication as to their list of 44 alleged facts.

IV. Conclusion

For the foregoing reasons, Defendants' motions for summary judgment are **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

8/13/02 /s/ Judith N. Keep
Date **Judge Judith N. Keep**
United States District Court
Southern District of California

CC: ALL PARTIES
MAGISTRATE JUDGE JOHN A. HOUSTON

HOSEY & BAHRAMBEYGUI
Patrick L. Hosey, Esq. (Bar No. 164104)
Sherry S. Bahrambeygui, Esq. (Bar No. 166330)
550 West C Street, Suite 2050
San Diego, CA 92101
Telephone: (619) 231-0500
Facsimile: (619) 238-1097

Attorneys for Plaintiff
DAVID GENZLER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID GENZLER,

Plaintiff,

v.

PETER LONGANBACH, an individual; JEFFREY O'BRIEN, an individual, GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive,

Defendants.

Case No.
01 CV 1462 K (JAH)

FIRST AMENDED COMPLAINT FOR DAMAGES

DEMAND FOR JURY TRIAL

1. Violation of Civil Rights – 42 U.S.C. 1983
2. Conspiracy to Violate Civil Rights – 42 U.S.C. 1983;
3. Negligent Hiring;
4. Negligent Supervision;
5. Aiding and Abetting;
6. Aiding and Abetting;
7. Civil Rights Violation – CC § 52.1
8. Conspiracy to Violate – CC § 52.1;
9. Intentional Infliction of Emotional Distress;
10. Negligent Infliction of Emotional Distress

(Filed Aug. 24, 2001)

There is an old maxim which states that: *"The Prosecution delights in acquittal as much as conviction."* This maxim is based on the principle that it is the ethical duty of a prosecutor to seek justice and not merely convict. The defendants in this case have made a mockery of this principle.

GENERAL OVERVIEW

This case involves a prosecutor who would stop at nothing to get what he wanted, including engaging in criminal conduct in order to secure a conviction, even if the person was innocent of the charge. The prosecutor was known within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE as someone who was unethical and used illegal tactics. He was known to be dishonest and untrustworthy by the judiciary. But because he got convictions using these tactics, the most senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE did nothing to rein him in. Instead they established a secret, unwritten custom and practice whereby such conduct was not only tolerated and condoned, it was rewarded. In violation of clearly established constitutional and statutory rights, and in contravention of explicit policies of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE, the individual defendants named herein tolerated, condoned, rewarded or participated in the concealment of exculpatory evidence, the fabrication of false evidence, improper witness tampering and subornation of perjury. In the past six years, this unofficial custom and practice has lead to an unprecedented number of highly publicized scandals that have severely damaged the reputation of the SAN DIEGO COUNTY DISTRICT

ATTORNEY'S OFFICE and the perception of justice in the County. Plaintiff, DAVID GENZLER, was a victim of this unofficial custom and practice that led to his being wrongfully convicted and sentenced to 20 years to life in prison.

Plaintiff, DAVID GENZLER, alleges as follows:

1. Jurisdiction and venue are proper in this Court because all claims arise out of 42 U.S.C. section 1983, and all events occurred in this venue and most witnesses and parties either reside in this venue or are governmental entities which acted within this venue.

2. Plaintiff demands a jury trial of the matters set forth herein.

3. Plaintiff, DAVID GENZLER (hereinafter "GENZLER") is a citizen of the United States who was (except for those times specifically set forth herein) and is, at all times relevant, a resident of the county of San Diego, California.

4. GENZLER was born on November 3, 1970.

5. The COUNTY OF SAN DIEGO, is a governmental entity organized under the laws and constitution of the state of California. The COUNTY OF SAN DIEGO is sued herein in its capacity as the governmental entity with ultimate responsibility for the non-prosecutorial functions and day to day operations of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, including that office's administrative functions of hiring, firing, compensation, promotion, discipline and assignment of its employees.

6. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE is a subdivision of the COUNTY OF SAN DIEGO and is sued herein as an agent of SAN DIEGO

COUNTY in its day to day administration of the office, particularly with respect to the hiring, firing, compensation, promotion, discipline and assigning of employees of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Through its hiring, firing, compensation, promotion, job assignments and failure to discipline, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE at all times mentioned herein maintained and fostered the customs and practices which gave rise to the injuries complained of herein including, but not limited to, the custom and practice of hiding, destroying and/or suppressing evidence, as well as creating false evidence during the investigatory phases of a criminal action, and suppressing evidence which would be exculpatory to a person accused of or suspected in a criminal action and/or proceeding.

7. Plaintiff is informed and believes, and thereon alleges, that PETER LONGANBACH (hereinafter "LONGANBACH") was at all times mentioned herein, a Deputy District Attorney (hereinafter "DDA") employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, LONGANBACH was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. LONGANBACH is sued in his individual capacity for the acts set forth herein.

8. Plaintiff is informed and believes, and thereon alleges, that JEFFREY O'BRIEN (hereinafter "O'BRIEN") was at all times mentioned herein, an investigator employed by or with the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, At some times relevant hereto O'BRIEN was acting within the scope of his employment

as a District Attorney investigator and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. O'BRIEN is sued in his individual capacity for the acts set forth below.

9. Plaintiff is informed and believes, and thereon alleges, that GREGORY THOMPSON (hereinafter "THOMPSON") was at all times mentioned herein, a DDA employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, THOMPSON was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. THOMPSON is being named in his individual capacity for participation in the acts set forth below.

10. Plaintiff is informed and believes, and thereon alleges, that JAMES PIPPEN (hereinafter "PIPPEN") was at all times mentioned herein, a DDA employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, PIPPEN was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. PIPPEN is being named in his individual capacity for participation in the acts set forth below.

11. Plaintiff is informed and believes, and thereon alleges, that PAUL PFINGST (hereinafter "PFINGST") was at all times mentioned herein, the San Diego County

District Attorney and is and was an elected official, employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, PFINGST was acting within the scope of his employment as District Attorney and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. PFINGST is being named in his individual capacity for participation in the acts set forth below.

12. The names and/or capacities, whether individual, corporate, or otherwise of defendants, sued as DOES I through 100, are presently unknown to plaintiff, who identifies said defendants by such fictitious names. Plaintiff will seek leave of this Court to amend his complaint to show the true names and capacities when same become known.

13. At all times mentioned herein the individual defendants were acting as the agents or co-conspirators, of each other, and each and every one of the acts performed by them were performed within the course and scope of their agency or conspiracy and/or were authorized, approved, ratified and/or condoned by the remaining defendants.

INTRODUCTION

14. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE employed LONGANBACH as a prosecutor and provided him with the power to inflict irreparable harm upon the citizens of this community despite its knowledge that he violated numerous ethical and criminal laws, that he acted maliciously and in his own self-interest,

and that he was the antithesis of what an honest DDA was supposed to be.

15. In the spring of 1996, LONGANBACH and his investigative team, which included O'BRIEN, were assigned to the GENZLER case – a street fight that resulted in the death of Dustin "Dusty" Harless. This became a very high profile and well publicized case due, in part, to the fact that the victim, Dusty Harless, was a well known surfing personality in the area.

16. In order to gain a murder conviction, LONGANBACH and his investigative team, used their administrative and investigatory functions to, inter alia, influence investigations into the incident, alter investigative reports, hide evidence, destroy evidence, tamper with evidence and suborn perjury, threaten witnesses.

17. LONGANBACH was able to accomplish these acts because the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and those individual defendants named herein, maintained an unwritten custom and practice of ignoring, condoning, and/or ratifying unethical conduct and behavior of its prosecutors.

18. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE also established and maintained policies and procedures for promoting and/or rewarding prosecutors who obtained convictions regardless of the unethical methods used in gaining the convictions or any wrongful conduct which violated the constitutional rights of the accused.

19. Plaintiff is informed and believes that DDAs are classified and promoted according to internal policies and

procedures established by the individually named defendants, PFINGST and THOMPSON. The classifications of DDA range from lowest and/or least experienced (Grade I) up through the highest ranking members within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE (Grade V).

20. At the time the misconduct alleged herein began, LONGANBACH was a Grade IV attorney. He was later promoted to Grade V. Before LONGANBACH and O'BRIEN were assigned to the GENZLER matter, they had acquired a reputation within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE for engaging in illegal acts and unethical conduct, including the planting of evidence in order to secure convictions. This reputation was known or reasonably should have been known to PFINGST, THOMPSON and PIPPIN, who nonetheless failed to discipline either LONGANBACH or O'BRIEN and continued to maintain LONGANBACH in his Grade IV position. Furthermore, they rewarded LONGANBACH for his past misconduct by assigning him to the high-profile GENZLER case. They then rewarded his misconduct in the GENZLER case by promoting him to Grade V and making him a division chief.

21. As a result of the misconduct and illegal acts of the defendants, GENZLER was inappropriately convicted of second degree murder and sentenced to 20 years to life in prison.

22. It was only after the conviction was reversed and remanded for new trial in 1999 that the misconduct in which LONGANBACH and his investigative team participated.

23. On remand, the case was assigned with a new DDA, Rebecca Blair, in March 1999.

24. In April 1999, Ms. Blair reported to THOMPSON and PIPPEN some of the misconduct she had discovered related to LONGANBACH and O'BRIEN in the GENZLER case. After Ms. Blair reported the misconduct, THOMPSON assumed control of the internal investigation into the misconduct.

25. In August 1999, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE was recused from the case and the retrial and investigation was placed in the hands of the State's Attorney General's office (hereinafter "AGO".)

26. During the internal investigation by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and while the investigation was being conducted by the AGO, defendants PFINGST, THOMPSON and PIPPEN used their administrative powers to protect LONGANBACH by trying to cover up the misconduct by improperly investigating the allegations, by denying the existence of exculpatory evidence, ignoring court orders not to destroy documents, continually delaying the release of materials known to exculpate GENZLER and/or demonstrate the depth and breadth of the misconduct, and by interfering with the investigation into the misconduct, all in an attempt to avoid accepting responsibility for what LONGANBACH and his investigative team had done in the investigation and prosecution of the case in 1996, and in an attempt to obtain another conviction of second degree murder.

27. Shortly after the case was taken over by the AGO, an investigation into other misconduct involving

LONGANBACH was initiated. A search warrant was eventually issued on the office of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE.

28. On or about August 25, 2000, GENZLER was exonerated of the second degree murder conviction when the jury returned a verdict of involuntary manslaughter.

29. GENZLER was sentenced on October 2, 2000.

30. GENZLER was released on February 14, 2001.

31. In February 2001, LONGANBACH was indicted by a grand jury for eight (8) counts of misappropriation of funds, four (4) counts of false accounting concerning public funds, one (1) count of embezzlement and grand theft.

FACTUAL ALLEGATIONS

A. Prior to the GENZLER Case, PFINGST, THOMPSON, and PIPPEN Initiated and Maintained Customs and Practices Which Encouraged LONGANBACH to Engage in Unethical and Dishonest Conduct.

32. In 1996, LONGANBACH was a DDA IV. He was supervised by PIPPEN.

33. PIPPEN was a DDA V. He reported directly to THOMPSON.

34.. THOMPSON was the highest ranking non-elected member in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Other than PFINGST, he was the highest ranking person in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. He reported directly to PFINGST.

35. Before assigning LONGANBACH to the GENZLER case, PFINGST, THOMPSON, and PIPPEN knew LONGANBACH bullied, intimidated and tampered with witnesses and that he was known to use unethical tactics to color, shade and otherwise change percipient witnesses' testimony in order to bolster the cases on which he worked.

36. Despite this knowledge of LONGANBACH's tactics and misconduct, he was not only permitted to continue prosecuting cases but was rewarded for his efforts by being assigned high profile cases. His conduct was tolerated for several reasons, including a) that LONGANBACH's tactics resulted in the convictions which made the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and therefore PFINGST, THOMPSON, and PIPPEN, look good in the public's eye; b) that LONGANBACH was friends with PFINGST, THOMPSON, and PIPPEN; and c) that LONGANBACH contributed to PFINGST's election campaign.

37. Despite these "benefits," PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was creating image problems within the office and outside.

38. It was known in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE that LONGANBACH would do whatever he thought needed to be done to accomplish his goals, even if it meant breaking the law or the State Bar's rules of professional conduct. It was also well known among the criminal defense bar and increasingly among the judiciary.

39. Specifically, other DDAs who were assigned to offices near LONGANBACH's repeatedly heard LONGANBACH loudly attempting to steer, color, bully, intimidate and

otherwise change witnesses' testimony. Such conduct, being unethical, was raised through administrative channels with supervisors, including PFINGST, THOMPSON, and PIPPEN, as were concerns about LONGANBACH's ethics, or lack thereof. Nothing was done.

40. This conduct continued throughout 1996, the year in which LONGANBACH actually prosecuted GENZLER. PFINGST, THOMPSON, and PIPPEN knew that it was going on and failed to do anything knowing that the tactics were advancing their professional and/or political goals.

41. Prior to 1996, LONGANBACH was also known for instructing percipient witnesses not to talk to a defendant's counsel or their investigators. Among criminal defense attorneys, he was reputed to stop at nothing, illegal or unethical conduct included, in order to obtain a conviction.

42. PFINGST, THOMPSON, and PIPPEN's tolerance of LONGANBACH's conduct constitutes an unconstitutional administrative custom and practice in violation of section 1983.

43. In addition to the above, PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was willing to hide evidence and alter investigative reports so as to remove evidence and/or information which benefitted a defendant. PFINGST, THOMPSON, and PIPPEN knew that other DDAs within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE who worked with and for LONGANBACH stated that they knew LONGANBACH "[p]ulled this shit. Everyone in this division knows he's dirty and does this shit . . . Everyone in the division knows it," yet they failed to take any action to prevent the

conduct knowing that their failure would result in the wrongful conviction of persons criminally accused, including GENZLER.

44. LONGANBACH's misconduct became so entrenched and wide spread that other DDAs in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE complained to PFINGST, THOMPSON, and PIPPEN that LONGANBACH is "a cancer that needs to be cut out of the District Attorney's Office."

45. Much of the concern raised by other DDAs stemmed from disputes with LONGANBACH "over the ethics" of his conduct. For example, LONGANBACH was known to have requested that other DDAs prepare false paper work.

46. Some of the disputes between LONGANBACH and other DDAs were raised with top members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and to LONGANBACH's superiors. Nothing was done.

47. LONGANBACH's unethical conduct even resulted in DA investigators refusing to work with him. In one instance, an investigator complained to a supervisor that LONGANBACH illegally instructed the investigator and police officers to return evidence in a homicide case to its original location so that a search warrant could then be obtained, thereby making the evidence admissible in court. LONGANBACH's illegal request was reported to supervisory personnel at the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Nothing was done.

48. LONGANBACH's reputation for unethical conduct in investigations and prosecutions was also known by members of the judiciary.

49. A sitting judge of the San Diego County Superior Court complained about LONGANBACH's poor reputation in the legal community for honesty and ethics. Several Superior Court judges and others in the justice system expressed their concern that LONGANBACH was "a black eye on the concept of what prosecution is all about." He was widely reputed to play games with discovery, play "hide the ball," and bully attorneys and even judges.

50. In the face of all the knowledge of misconduct and illegal behavior by the prosecutor, PFINGST, THOMPSON, and PIPPEN repeatedly failed and refused to act and/or take any corrective or administrative action against LONGANBACH and other DDAs who engaged in similar misconduct. Such a decision constitutes the creation of a custom and practice of permitting individual prosecutors to abuse their positions and power in order to violate the constitutional rights of community members accused of a crime.

B. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE Knew LONGANBACH Was Committing Prosecutorial Misconduct in the Investigation and Prosecution of GENZLER.

51. LONGANBACH made two important promises to PFINGST, THOMPSON, and PIPPEN in the course of his assignment to prosecute GENZLER in 1996: first, that he could successfully recuse defense counsel from the case and that the recusal would be upheld on appeal; and second, that he would obtain a murder conviction. LONGANBACH, PFINGST, THOMPSON, and PIPPEN knew that in order for LONGANBACH to keep these promises, he would inevitably violate ethical rules, criminal statutes

and trample on the constitutional rights of GENZLER. They were right.

52. During the initial investigation of the GENZLER case, it became apparent that the incident giving rise to the criminal charges against GENZLER resulted from a chance meeting that escalated into a street fight wherein Dusty Harless was unfortunately killed.

53. LONGANBACH received a copy of the initial investigative report by O'BRIEN.

54. LONGANBACH knew that GENZLER would claim self-defense in the criminal case.

55. The initial report indicated that, *inter alia*, key witness Sky Flanders (Mr. Harless' girlfriend) was aware of and had seen Mr. Harless in multiple street fights and brawls. LONGANBACH knew that such information would support GENZLER's claim of self-defense.

56. LONGANBACH ordered O'BRIEN to destroy the report and redraft it deleting any reference to Mr. Harless' prior physical conflicts or any other potentially exculpatory evidence/information.

57. O'BRIEN destroyed the original report and rewrote it without reference to Mr. Harless' prior street fights or Ms. Flanders' knowledge of Mr. Harless being involved in brawls.

58. In order for the revised report to go undetected, LONGANBACH and O'BRIEN conspired to hide evidence and hide the truth by tampering with witnesses and suborning perjury. They used their investigatory and administrative functions and used the administrative

powers of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE to execute a plan to keep exculpatory information, evidence and documents, to which GENZLER's attorneys were entitled, from GENZLER's attorneys. They refused to provide and otherwise delayed providing information to which GENZLER's attorneys were entitled. This gave them time to tamper with witnesses and change their testimony before the preliminary hearing which took place on or about May 23, 1996.

59. In addition to altering the report, while initially investigating the case, they coerced and bullied witnesses into changing their testimony related to what occurred on the night of the incident. Such acts were done during the investigatory phase of the case and while LONGANBACH was acting in an investigatory role.

60. The two lead witnesses for the prosecution were Scott Davis and Sky Flanders, the victim's girlfriend. Both spoke with police at the scene and gave immediate, first hand accounts of what they saw and experienced. Both also participated in taped interviews with police on or about April 18, 1996, more than one month before the preliminary hearing.

61. Transcripts of both interviews, as well as numerous other witness statements which were in the possession of LONGANBACH and O'BRIEN, were kept from GENZLER's counsel until after the preliminary hearing.

62. The timing and manner in which discovery is collected, organized and produced to a criminal defendant's counsel is an investigatory and/or administrative function/act. Thus, LONGANBACH used his administrative and investigatory powers to ensure that GENZLER's attorneys did not have the benefit of the statements when

the witnesses testified, and therefore could not cross-examine the witnesses on the contradictions between their testimony and what was contained in the previously recorded statements.

63. Still further, when the tapes were eventually disclosed, the tape related to Scott Davis had been tampered with.

64. Specifically, Scott Davis gave a recorded statement to homicide detective Jackson. Detective Jackson recorded the entire statement and turned the tapes over to the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. When GENZLER's attorneys sought a copy of Scott Davis' critical initial statement, side "A" of the tape mysteriously came up blank. LONGANBACH and/or O'BRIEN were in possession of the tape since shortly after it was created – and now the first half of it was missing.

65. Sky Flanders also gave a taped statement to police investigators on or about April 18, 1996. During that interview, Ms. Flanders describes the "fight" much differently than she did at later dates. In fact, Ms. Flanders admits on tape (the first time she discussed the incident) that Dusty Harless was "on top" of GENZLER during the altercation; a fact which supported GENZLER's claim of self defense and a fact which was deleted from O'BRIEN's report.

66. LONGANBACH and O'BRIEN knew that information from Ms. Flanders which supported GENZLER's self-defense claim had been deleted from the investigative report and that GENZLER's attorneys had thus far been deprived of the taped interviews. They then suborned perjury. Specifically, prior to the preliminary hearing and

during the initial investigation of the incident, LONGANBACH and O'BRIEN met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past.

67. After meeting with LONGANBACH and O'BRIEN, Ms. Flanders changed her testimony related to what she saw during the altercation. Since GENZLER's attorneys did not have access to the taped statement and therefore were without benefit of its contents, they were unable to cross-examine Ms. Flanders on her changed testimony or the reasons for the change.

68. Ms. Flanders had now perjured herself and was therefore committed to LONGANBACH's plan to obtain a murder conviction in the case regardless of the methods or means by which the conviction was obtained.

69. As indicated above, Sky Flanders was also told to testify falsely about having actually seen Mr. Harless in prior street or bar fights and about her knowledge of his being in other fights/brawls.

70. LONGANBACH and O'BRIEN knew that Ms. Flanders' testimony as to her knowledge of past aggressive conduct by Dusty Harless would be critical to gaining the conviction that they sought. During the investigation, they conveyed this in no uncertain terms to Ms. Flanders. They then put her on the stand, repeatedly, and allowed her to perjure herself. Her testimony was case determinative. It was also thoroughly dishonest.

71. Prior to the preliminary hearing in the case, it became apparent to GENZLER's attorneys that key discovery items which were in the possession of the prosecution's

investigatory team were missing from the materials provided to them. These materials were crucial to GENZLER's defense. Taken together, there was a massive amount of documents, evidence and material which had been hidden. GENZLER's attorney, Gerald Blank, prepared and presented a motion for a continuance of the preliminary hearing. The motion was heard on May 21, 1996, before the Honorable Adrienne Orfield, Judge Presiding. At the hearing, LONGANBACH stated that he was not aware of the existence of, *inter alia,* the percipient witnesses' taped statements, some of which were more than one month old at the time and which the prosecution had been using during their investigation. The materials were then sporadically and grudgingly provided to GENZLER's attorneys. The materials were provided either on the eve of the preliminary hearing or after it had taken place. The timing of the disclosures prevented GENZLER's attorneys from utilizing the materials at the preliminary hearing.

72. Although the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and law enforcement officials had possession of and access to this information well before the preliminary examination, and used these materials during their investigations, they used their investigative and administrative functions and powers to hide, secrete and otherwise prevent GENZLER's attorneys from getting access to the materials or using them in the criminal defense investigation and/or defense of the case.

73. The above conduct, in essence, prevented GENZLER's attorneys from properly examining witnesses during the preliminary hearing or preparing the case as quickly and fully as it should have been. Thus, the prosecution used its investigatory and administrative powers to

deprive GENZLER of his constitutional rights to a fair trial as set forth herein.

74. LONGANBACH and O'BRIEN's misconduct did not stop there. On August 22, 1996, at an evidentiary hearing held before the Honorable Joan P. Weber, LONGANBACH granted prosecution witness, Sheri Logel, immunity in exchange for testimony favorable to the prosecution. This grant of immunity included immunity from perjury and *not just, from past acts of perjury, but was intended to cover future acts of lying on the stand at the trial of plaintiff.* In essence, LONGANBACH gave Ms. Logel a "get out of jail free card" for lying on the stand. This was done with the knowledge of PFINGST, THOMPSON, and PIPPEN.

75. Ms. Logel then went on to perjure herself at LONGANBACH's specific direction. She testified that she had given to Mr. Blank the knife which allegedly had been used in the altercation wherein Mr. Harless was killed. She further testified for LONGANBACH that Mr. Blank then wiped the knife clean and instructed her to return it to the car from where it was initially taken by her.

76. Mr. Blank later raised the grant of immunity with the trial judge, Judge Kennedy, who promptly disallowed and/or revoked the grant of immunity as to perjury, in his court.

77. Later, having her perjury immunity removed, Ms. Logel admitted that she had lied under oath about her dealings with Gerald Blank, including her testimony related to delivering evidence, including that knife, to Gerald Blank's office.

78. Ms. Logel lied because she was threatened by LONGANBACH. Specifically, she stated that after she found the knife in her trunk she told LONGANBACH. LONGANBACH responded by threatening that if she didn't testify that Mr. Blank gave her the knife and instructed her on what to do with it, he would send her to jail and take away her children.

79. The false testimony, caused by a combination of threats and a grant of immunity, was committed as part of an investigatory aspect in the case. It violated GENZLER's constitutional rights to a fair trial and interfered with GENZLER's relationship with his chosen retained counsel. In fact, the relationship was completely severed. While Ms. Logel did not testify at trial, her lies were the key to a ruling by Judge Kennedy which recused Mr. Blank from the case. Without her false testimony there would have been no basis for the ruling to recuse GENZLER's counsel.

80. LONGANBACH used Ms. Logel's lies when he represented to Judge Kennedy that he intended on calling both Ms. Logel and Mr. Blank as witnesses in the case. In fact, LONGANBACH bluntly assured Judge Kennedy that he would call both as trial witnesses. Judge Kennedy told LONGANBACH he did not want to be "sandbagged" on the issue; however, based on Ms. Logel's perjured testimony and LONGANBACH's representations, Judge Kennedy recused Mr. Blank and thereby removed GENZLER's attorney of choice.

81. Neither Mr. Blank nor Ms. Logel were called as trial witnesses by LONGANBACH. It The entire presentation of false evidence and perjured testimony was nothing but an attempt to remove GENZLER's attorney from the case so as to improperly influence the outcome of the case

which LONGANBACH had promised PFINGST, THOMPSON, and PIPPEN he would win.

82. LONGANBACH was excited by the recusal ploy he used. It became one of his favorite tactics. He tried the same tactic in other cases and on other attorneys. PFINGST, THOMPSON, and PIPPEN were aware of what he was doing and how he was doing it, but continued to condone and ratify his conduct, because it worked.

83. Prior to LONGANBACH's motion to recuse Mr. Blank, and as part of the investigation of the incident, Sky Flanders informed O'BRIEN and LONGANBACH of at least two instances where she witnessed Dusty Harless in "street fights" and told LONGANBACH of at least one other incident wherein she heard that Mr. Harless "launched" several males who had surrounded him in a physical altercation at a bar. Not only did the evidence support the conclusion that this critical defense evidence was removed from O'BRIEN's first version of the report, at LONGANBACH's direction, but Ms. Flanders was told not to mention these fights on the witness stand. Ms. Flanders was also told that any mention of these fights would diminish the likelihood of a conviction. Accordingly, she testified in the 1996 trial that she had never witnessed Dusty Harless in any "street fights."

84. Ms. Flanders provided vivid detail of the incident at Cable and Voltaire to Officers McElfresh and Duran at the scene, and then again to friends and family members within hours after the incident. She was clear as to what she saw. Those facts supported GENZLER's claim of self-defense. However, following her initial meetings with LONGANBACH and O'BRIEN during their investigation, she was suddenly "secure" in her belief that she had not

seen the incident or any of the events which supported GENZLER'S claim of self-defense. Sky Flanders later admitted that she had testified falsely as a result of her meetings with LONGANBACH and O'BRIEN, and further that she did not want to lie on the stand again.

85. Ms. Flanders stated that she knew when she left the first meeting with LONGANBACH and O'BRIEN that it would be better for the case if she didn't see the details or testify to them.

86. LONGANBACH also used his investigative and administrative powers to hide other evidence. A four (4) page San Diego Police Department ("SDPD") Crime/ Incident Report in SDPD Case Number 93-063750, relating to an alleged incident between GENZLER (and others) and John M. Belsan, a prosecution witness in GENZLER's 1996 trial, was also hidden by LONGANBACH and/or his investigators at the direction of LONGANBACH. The incident allegedly occurred on July 18, 1993, when Mr. Belsan was working as a bouncer at a Pacific Beach bar named "Mick's" and where GENZLER and others were patrons. An altercation occurred. GENZLER was neither arrested by the SDPD nor prosecuted with respect to this incident.

87. During the 1996 proceedings, LONGANBACH had Mr. Belsan testify that this incident was a prior violent act committed by GENZLER. However, the aforementioned police report was never disclosed to the defense in connection with GENZLER's 1996 trial proceedings.

88. Still further, later in the trial, the defense tried to subpoena the police report from the SDPD. In response, the defense received a Certification of No Records. As such, LONGANBACH and O'BRIEN used their positions

to remove the only available copies of the report related to the "Belsan" incident and thereby further prejudice GENZLER and prevent him from obtaining a fair trial.

89. LONGANBACH also used the "Belsan" incident to add another spring board to his closing argument. Mr. Belsan testified he was "hit across the shoulders with something, a pipe, stick, board." When he turned around, he said he was facing the GENZLER brothers. The SDPD Crime/Incident Report patently controverted this allegation in that it indicated that the only weapon listed there is "hands and feet." Nevertheless, LONGANBACH argued in his closing argument that Belsan's testimony was proof that GENZLER was the "master of the sneak attack . . . I think we also see a pattern. The defendant is the master of the surprise attack, the sneak attack. That's what he did with John Belsan."

90. To compound this array of misconduct both in and out of the courtroom, LONGANBACH then argued to the jury the relevance and importance of the "Belsan" incident by referring to it as evidence of "other crimes," by GENZLER which "you [the jury] can use this evidence of other crimes in evaluating the credibility of self-defense."

91. In addition, LONGANBACH argued how GENZLER kicked Mr. Belsan in the face. He made this allegation knowing that his investigation tactics had discovered the medical records of Mr. Belsan that contained no indication that such a kick ever occurred. These records could have been used to impeach Mr. Belsan's credibility. Specifically, on December 2, 1996, Nancy Cervi, Mission Bay Hospital custodian of records, appeared in court in response to a defense subpoena. She stated she did not have the medical records related to Mr. Belsan's treatment

from the night at issue but had already turned them over to O'BRIEN. She had given them to O'BRIEN on August, 26, 1996, almost three (3) months prior to the trial date whereupon LONGANBACH called Mr. Belsan to the stand. Those records were withheld from GENZLER's counsel during the trial.

92. Years later, when it eventually was turned over, the police report showed that not only did Mr. Belsan's testimony on the description of the incident and his injuries vary from those he gave the police the night of this incident and those which were contained in the police report, but even his physical description of GENZLER was different. Because the report was hidden, GENZLER's attorneys were not only unable to impeach Mr. Belsan with his prior inconsistent statements, but they were also unable to ascertain the identities of the responding officers or call them to the stand to impeach Mr. Belsan. Thus, the only evidence available to impeach Mr. Belsan's testimony, was that of GENZLER.

93. In short, LONGANBACH used his investigatory and administrative powers to frustrate and corrupt GENZLER's right to a fair trial, then used his position as trial attorney to capitalize on those illegal acts thus furthering the violations to GENZLER's constitutional rights.

94. LONGANBACH also attempted to influence other investigators to perjure themselves at the 1996 trial and alter reports related to the underlying incident with Mr. Harless. Specifically, LONGANBACH was aware of an issue related to blood stains on a shirt allegedly worn by GENZLER on the night of the incident. The DNA evidence was degraded. The cause of the degradation was apparently exposure to moisture. LONGANBACH wanted to

argue that GENZLER washed the shirt himself, thus demonstrating his intent to cover up a crime. Accordingly, LONGANBACH contacted Sargent Martin, the officer who investigated the scene and who wrote the description of the area and weather conditions on the evening of the incident. LONGANBACH told him: "Just remember, rain is bad." The reason that "rain is bad" is because it would explain why the shirt was exposed to moisture.

95. Not surprisingly, LONGANBACH obtained the conviction he was after. On February 10, 1997, GENZLER was sentenced for second degree murder. He was given 20 years to life. He was 26 years old and faced spending the rest of his life in prison.

96. After securing GENZLER's conviction, LONGANBACH was promoted to the position of Chief of the Fraud Division for the District Attorney's Office. This promotion constitutes PFINGST, THOMPSON, and PIPPEN's "official" ratification of LONGANBACH's unethical and illegal conduct. In essence, they promoted him for violating GENZLER's constitutional rights and getting away with it.

97. While in his elevated position, LONGANBACH was frequently observed engaging in conduct which was unethical and illegal which included overt attempts to further violate the rights of persons whom he was prosecuting. However, none of this conduct ran afoul of the administrative goals of PFINGST, THOMPSON, and PIPPEN as long as he was getting the convictions. In fact, it was only after allegations that LONGANBACH illegally used of county personnel and equipment to work on his personal affairs and financial matters that anyone became critical of his behavior. In essence, it was acceptable that

LONGANBACH was violating the constitutional rights of citizens but unacceptable if he stealing time or resources from the County.

98. The lengths to which LONGANBACH would go to gain an unfair and unethical advantage were well known prior to and during the retrial phase. As a specific example, LONGANBACH, and those under his direction, would engage in investigatory and administrative misconduct such as hiding approximately 100 pages of discovery relevant to a case being tried, among 18,000 pages of discovery in the case. The defense had requested all documents. LONGANBACH directed those under his supervision to devise a plan to make discovery extremely difficult for the defense attorneys to manage or find the relevant material. They did so by collating the 100 pages of relevant discovery into the 18,000 thousand pages of other documents with the specific purpose of making the relevant discovery hard, if even possible, to find.

99. By way of further example, at LONGANBACH's direction, his investigators and/or administrative staff altered evidence by changing numbers on documents and intentionally made light copies of discovery on the office copier so that they could not be read.

100. O'BRIEN was seen and known to have done the same things.

101. Still further, LONGANBACH was known to have obtained confidential information related to criminal defenses and not only failed to return the documents, but altered his prosecution strategy so as to make use of the information which he illegally maintained.

102. PFINGST, THOMPSON, and PIPPEN were aware of these incidents and failed to do anything about them. Rather, they allowed LONGANBACH to continue engaging in such tactics.

103. Because of the administrative policies permitting, condoning and fostering the above referenced conduct, LONGANBACH and O'BRIEN were free to and did conspire and acted so as to change the investigative report related to Sky Flanders, manufacture evidence and suborned perjury. They deleted references to statements that described Harless as a fighter who had been in multiple street fights. Later, PFINGST, THOMPSON, and PIPPEN became aware that the information was removed from the reports provided to GENZLER's attorneys and that LONGANBACH and O'BRIEN had coerced Sky Flanders into perjuring herself, PFINGST, THOMPSON, and PIPPEN either failed to act or acted inappropriately, thereby condoning and furthering the misconduct. Specifically, even after the wrongful conduct of LONGANBACH and O'BRIEN were known, PFINGST, THOMPSON, and PIPPEN continued to make excuses for the acts and hide the truth.

C. PFINGST, THOMPSON, AND PIPPEN Tried to Protect LONGANBACH and Cover up the Misconduct.

104. LONGANBACH's unethical conduct and obvious willingness to do anything to win was noted by professionals outside the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. These complaints were received before GENZLER's case was remanded on appeal. Therefore, before the specific allegations of misconduct were made in the instant matter, PFINGST, THOMPSON, and

PIPPEN knew of LONGANBACH's inappropriate behavior and willingness to lie, cheat and engage in illegal behavior.

105. In a letter to PFINGST dated November 30, 1998, economist Arthur Brodshatzer wrote about his recent experience dealing with LONGANBACH in an unrelated case on which LONGANBACH had asked him to consult: " . . . frankly I was appalled at his [LONGANBACH's] total dishonesty . . . but he just made me want to retch. I think you should do something about this man. He is a danger to your office and to the likelihood of someone getting a fair trial. Obviously, he can lie with ease."

106. Nothing was done by PFINGST, THOMPSON, or PIPPEN.

107. In the early spring of 1999, the GENZLER case was remanded for retrial and assigned to DDA Rebecca Blair for prosecution. As she began working on the case, she discovered facts which clearly violated her code of ethics and those purportedly formally espoused and adopted by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE.

108. In April 1999, when LONGANBACH's misconduct was initially discovered by DDA Blair during her conversation with O'BRIEN, she had a meeting with top level members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE including THOMPSON, and PIPPEN. During the meeting, she was not only discouraged from immediately presenting the information to GENZLER's defense attorneys, but was actively prevented from doing so. Still further, she was discouraged from pursuing her inquiry into any prosecutorial misconduct.

109. In addition, after PFINGST, THOMPSON, and PIPPEN learned that there was no way that they could keep the misconduct secret, they attempted to not only minimize the events, but took steps to protect LONGANBACH from internal investigations that would readily and easily prove that he had corrupted the investigation, mishandled the case, and engaged in illegal conduct in the preparation of the case both in its investigative and trial phases. Specifically, *before* reluctantly initiating internal investigation into LONGANBACH's misconduct, PIPPEN, at the direction of THOMPSON called LONGANBACH at home and warned him that they were being forced to initiate an investigation and thereby gave him an opportunity to destroy evidence, documents and materials related to what he had done.

110. THOMPSON then assigned an investigator to conduct inquiries into the misconduct of LONGANBACH and O'BRIEN. THOMPSON instructed the investigator **not** to any notes during any of his interviews, THOMPSON also admonished the investigator that "this was an investigation in name only." In essence, PFINGST, THOMPSON, and PIPPEN used their administrative powers to intentionally thwart the efforts and effectiveness of an investigation into investigatory, administrative and prosecutorial misconduct by advising the target of the investigation that he needed to be prepared. PFINGST, THOMPSON, and PIPPEN intentionally gave LONGANBACH the opportunity to get ready and prepared to be investigated. Such conduct constitutes ratification of the underlying acts, a conspiracy to cover up the violations to GENZLER's constitutional rights and a conspiracy to again attempt to deprive GENZLER of his constitutional rights to a fair trial by hiding exculpatory evidence.

111. After the Court of Appeals remanded the case for new trial, LONGANBACH, using a pretext of trying to help DDA Blair, tried to exert pressure on DDA Blair and control the case from the outside. He had meetings with her wherein he tried to steer the case and tell her how she needed to handle the prosecution. These efforts and contacts were nothing more than an attempt to cover up his wrongful conduct in the 1996 investigation and trial.

112. DDA Blair told LONGANBACH that she did not want him involved at all.

113. PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was engaged in this conduct. They did nothing to stop it, rather they also pressured DDA Blair to not pursue LONGANBACH's misconduct as aggressively as she intended.

114. PFINGST, THOMPSON, and PIPPEN also used their administrative powers to withhold evidence from GENZLER's attorneys. As set forth above, as part of the case's initial investigation, LONGANBACH and O'BRIEN changed and hid reports, including that which was related to Mr. Belsan's felony arrest. Although the reports were requested, LONGANBACH never produced them. Later, after the case's remand, GENZLER's attorneys again requested that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE produce the reports. In fact, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE was ordered by the court to produce them. However, they failed to do so. The reports and evidence were in the possession of the defendants, however they used their administrative roles and/or functions to delay, subvert and frustrate the discovery process. The reports were not provided to GENZLER's attorneys until October 15, 1999,

after the AGO's took over the case. The cover memorandum makes it clear that the report was in the possession of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and turned over to the AGO after the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE finally recused itself from the retrial.

115. PFINGST, THOMPSON, and PIPPEN decided that they would handle the investigation into LONGANBACH's misconduct and, on an administrative level, handle the production of information to the defense. PFINGST, THOMPSON, and PIPPEN, in their individual capacities within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE had materials which were exculpatory. The court ordered that these materials be produced. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE failed to produce the evidence related to the misconduct despite the fact that they were initially the agency conducting the investigation. These acts and omissions constitute participation by PFINGST, THOMPSON, and PIPPEN in a cover up of the wrongful acts of LONGANBACH and O'BRIEN. In fact, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE's failure to wholly and promptly comply with all requests and discovery orders in the second trial was nothing more than an attempt to reconvict GENZLER of second degree murder so that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE could later take the position that there were no adverse consequences to LONGANBACH's and O'BRIEN's misconduct.

116. On June 22, 1999, a hearing was held before Superior Court Judge Shore. The Court ordered, *inter alia*, that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S

OFFICE was to not destroy any additional records related to the prosecution of plaintiff.

117. Over the following weeks and months, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, led by PFINGST, THOMPSON, and PIPPEN, ignored the Court's order and continued destroying notes, reports and other documentary evidence sought by defense counsel.

118. During the investigation by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and then the investigation by the AGO of the allegations of misconduct related to the GENZLER case, PFINGST, THOMPSON, and PIPPEN, were aware that O'BRIEN was lying about what he did and did not do related to deleting material from reports and helping LONGANBACH get witnesses to change their testimony.

119. PFINGST, THOMPSON, and PIPPEN, also knew that, *inter alia,* O'BRIEN, at the prompting of LONGANBACH, intentionally deleted from his report information which PFINGST, THOMPSON, and PIPPEN, knew that investigators, and O'BRIEN specifically, routinely included in reports. Knowing that the information had been removed, PFINGST, THOMPSON, and PIPPEN, continued to protect O'BRIEN and LONGANBACH by not providing GENZLER's attorneys access to the requested information.

120. PFINGST, THOMPSON, and PIPPEN, also permitted O'BRIEN's report related to his initial interview with Sky Flanders to disappear and/or be deleted.

121. After it became known to PFINGST, THOMPSON, and PIPPEN, that DDA Blair was preparing evidence and participating in an investigation related to

prosecutorial misconduct and later that she would be testifying honestly about the prosecutorial misconduct that her office had engaged in, she was ostracized by PFINGST, THOMPSON, and PIPPEN, and pressured to change her testimony about what she was told by O'BRIEN about the suborning of perjury. Still further, at the direction of PFINGST, THOMPSON, and PIPPEN, she was portrayed in open court as being incompetent, histrionic and inexperienced. She was eventually transferred to a position which was considered to be a demotion.

122. DDA Blair was not the only DDA who went to senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE with knowledge of LONGANBACH's misconduct and unethical behavior. Like Blair, they too suffered retaliation.

123. In August 1999, once it was finally decided that the matter was to be turned over to the AGO, LONGANBACH was told by senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE of the imminent change. LONGANBACH was seen shortly thereafter, early in the morning well before he usually entered the office and before anyone else usually got to the office, going through files and gathering materials from his office.

124. At hearings related to the retrial, including dismissal hearings and evidentiary hearings, senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE were seen holding closed door meetings with LONGANBACH and O'BRIEN and were also heard telling LONGANBACH that he had "to keep it together."

125. All of the above acts were administrative functions which were being used by defendants, and each of them, in an attempt to violate GENZLER's constitutional rights – the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.

126. LONGANBACH, and the other defendants conspired, acted in concert, and aided and abetted each other to do whatever was necessary, lawful or not, to cause GENZLER's conviction for second-degree murder, not only during the original prosecution in 1996, but also during his retrial in 2000, even though they had been relieved of any prosecutorial function in that case and even though their conduct frustrated an investigation by the AGO.

127. The individual defendants pressured, coerced, extorted and/or otherwise improperly caused witnesses to give untruthful, erroneous, incomplete and/or misleading statements and testimony related to the underlying case, as well as the investigation into LONGANBACH's misdeeds.

128. The aforementioned conduct establishes violations of GENZLER's constitutional right to the timely disclosure of exculpatory evidence, and of his constitutional right not be prosecuted, or convicted or sentenced upon the testimony of witnesses who have been illegally bribed, coerced or influenced in their testimony, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, and the right to a fair trial under the Fifth, Sixth and Fourteenth Amendments.

FIRST CAUSE OF ACTION

(Conspiracy to Commit Violation of the Civil Rights 42 U.S.C. 1983 – Against All Defendants)

129. Plaintiff realleges those allegations contained in the above paragraphs and incorporates them into this cause of action as the set forth fully herein.

130. Defendants, and each of them, as alleged above, entered into a conspiracy to violate the civil and constitutional rights of plaintiff, including violations of the first, fourth, fifth, eighth, thirteenth and fourteenth amendments.

131. As alleged in the foregoing paragraphs, the defendants, and each of them, both individually and by and through their agents and employees, acting under color of the State Law and/or statutes, ordinances, regulations, custom and usage, subjected, and/or caused to be subjected, plaintiff to violations of those rights, privileges and immunities secured by the Constitution and the laws of the United States and of the state of California.

132. As a direct and proximate result of the tortious acts of defendants, and each of them, plaintiff has suffered actual special and general damages, the nature and amount of which will be shown according to proof at the time of trial.

133. The defendants, and each of them, engaged in conduct and committed the acts complained of herein with the intent to harm the plaintiff. Said acts were done maliciously and oppressively. Plaintiff is therefore entitled to exemplary and punitive damages to be shown according to proof at the time of trial.

SECOND CAUSE OF ACTION

(Violation of Civil Rights 42 U.S.C. Section 1983 – Against All Defendants)

134. Plaintiff realleges those allegations contained in the above paragraphs and incorporates them into this cause of action as the set forth fully herein.

135. As alleged in the foregoing paragraphs, the defendants, and each of them, both individually and by and through their agents and employees, acting under color of statute, ordinance, regulations, custom and practices, subjected and/or caused to be subjected, plaintiff to violations of his civil rights, privileges and immunities, which are secured by the Constitution and laws of the United States and the of the State of California including violations of the first, fourth, fifth, eighth, thirteenth and fourteenth amendments.

136. As a direct and proximate result of the tortious acts of defendants, and each of them, plaintiff has suffered special and general damages, the exact nature and amount of which will be shown according to proof at the time trial.

137. The defendants, and each of them, engaging in conduct in committing the acts complained of herein which were malicious and oppressive and done with the intent to harm plaintiff. Plaintiff is therefore entitled to exemplary and punitive damages which will be shown according to proof that the time of trial.

THIRD CAUSE OF ACTION

(Negligent Hiring, Retention and Promotion – Against PFINGST, THOMPSON, and PIPPEN)

138. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

139. LONGANBACH lied on his civil service application and fraudulently repeatedly misrepresented the institution from which he obtained his law degree, on his resume, on internal administrative documents and to the public at large.

140. Due to the level of responsibilities to be vested in prosecutors, the individually named defendants have a duty to investigate and confirm the background and qualifications of those persons whom they hire, retain and promote.

141. Had the individually named defendants met their duties, LONGANBACH's willingness to misrepresent himself and his credentials would have been discovered. As such, they would have been on notice of his willingness to lie to further his professional goals.

142. PFINGST, THOMPSON, and PIPPEN had a duty to plaintiff to act with ordinary care and prudence in their administrative functions so as not to cause harm or injury to another.

143. By engaging in the acts and omissions alleged herein, the defendants not only failed to act with ordinary care, they acted with reckless disregard of the constitutional rights of plaintiff and others similarly situated.

144. As a direct, proximate and foreseeable result of the defendants breach of their duty of care, plaintiff suffered damages in an amount according to proof at the time of trial.

FOURTH CAUSE OF ACTION

(Negligent Supervision – Against PFINGST, THOMPSON and PIPPEN)

146. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

147. PFINGST, THOMPSON, and PIPPEN had a duty to plaintiff to act with ordinary care and prudence in their administrative functions and in their supervision of employees of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE so as not to cause harm or injury to another.

148. By engaging in the acts and omissions alleged herein, the defendants not only failed to act with ordinary care, they acted with reckless disregard for the constitutional rights of the plaintiff and others similarly situated.

149. As a direct, proximate and foreseeable result of the defendants breach of their duty of care, plaintiff suffered damages in an amount according to proof at the time of trial.

FIFTH CAUSE OF ACTION

(Aiding and Abetting – Against LONGANBACH and O'BRIEN)

150. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

151. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN knew that their conduct was going to and did cause a violation of GENZLER's constitutional rights as more fully set forth above.

152. By engaging in the acts and omissions set forth above LONGANBACH and O'BRIEN knew that their conduct was going to cause and/or threatened to cause additional and/or future violations of GENZLER's constitutional rights as more fully set forth above.

153. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN gave substantial assistance to each other in an effort to violate GENZLER's constitutional rights, by covering up the violations of his constitutional rights and in conspiring to subject GENZLER to future and/or continued violations.

154. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN aided and abetted each other in the perpetration of their illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

155. As a direct and proximate cause thereof, plaintiff has been and continues to be injured and suffered damages as set forth above in amounts to be proven at trial.

SIXTH CAUSE OF ACTION

(Aiding and Abetting – Against PFINGST, THOMPSON, and PIPPEN)

156. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

157. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN knew that LONGANBACH's conduct was going to and did cause a violation of GENZLER's constitutional rights as more fully set forth above.

158. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN knew that their conduct, coupled with that of LONGANBACH, was going to cause and/or threatened to cause additional and/or future violations of GENZLER's constitutional rights as more fully set forth above.

159. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN gave substantial assistance to LONGANBACH and to each other in an effort to violate GENZLER's constitutional rights, by covering up the violations of his constitutional rights and in conspiring to subject GENZLER to future and/or continued violations.

160. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN aided and abetted LONGANBACH in the perpetration of his illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

161. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN aided and abetted each other in the perpetration of their illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

162. As a direct and proximate cause thereof, plaintiff has been and continues to be injured and suffered damages as set forth above in amounts to be proven at trial.

SEVENTH CAUSE OF ACTION

(Civil Rights Violation B CC § 52.1 – Against All Individually Named Defendants)

163. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

164. Any person, whether or not acting under color of state law, interferes by threats, intimidation or coercion, with the exercise or enjoyment by any individual with rights secured by the Constitution or laws of the State of California, violates section 52.1 of the Unruh Civil Rights Act.

165. All defendants violated plaintiff's rights under section 52.1 by interfering with investigations, changing investigatory reports, committing perjury, suborning perjury, fabricating evidence and suppressing evidence in an effort to violate plaintiff's rights of to due process and a fair trial. The defendants succeeded in violating plaintiff's due process rights and right to a fair trial by engaging in the conduct alleged above.

166. Due to the violation of plaintiff's rights by all defendants, plaintiff has suffered economic damages and non-economic damages, including, but not limited to, attorney fees, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

167. Plaintiff's also entitled to the statutory civil penalties, exemplary damages and attorneys' fees and costs of suit incurred herein.

EIGHTH CAUSE OF ACTION

Conspiracy to Violate Civil Rights B CC § 52.1 (Against All Individually Named Defendants)

168. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

169. The defendants, and each of them, entered into a conspiracy to violate the civil and constitutional rights of plaintiff, including their right to due process and their right to a fair trial.

170. Any person, whether or not acting under color of state law, interferes by threats, intimidation or coercion, with the exercise or enjoyment by any individual with rights secured by the Constitution or laws of the State of California, violates section 52.1 of the Unruh Civil Rights Act. All defendants violated plaintiff's rights under section 52.1 by tampering with investigations, altering investigative reports, committing perjury, suborning perjury, fabricating evidence and suppressing evidence in an effort to violate plaintiff's rights to due process and a fair trial. The defendants succeeded in violating plaintiff's due

process rights and right to a fair trial by engaging in the conduct alleged above.

171. Due to the violation of plaintiff's rights by all defendants, plaintiff has suffered economic damages and non-economic damages, including, but not limited to, attorney fees, lost wages, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

172. Plaintiff is also entitled to the statutory civil penalties, exemplary damages and attorneys= fees and costs of suit incurred herein.

NINTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress – Against All Individually Named Defendants)

173. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

174. By engaging in the acts alleged herein, the defendants engaged in outrageous conduct that was intended to cause plaintiff to suffer emotional distress or engaged in the conduct with a reckless disregard of the probability of causing plaintiff to suffer emotional distress.

175. As a direct, proximate and foreseeable result, plaintiff suffered sever emotional distress and the outrageous conduct was the cause of the emotional distress suffered by plaintiff.

176. The conduct of defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294, *et seq.* and punitive damages should be

assessed against each defendant for the purpose of punishment and for the sake of example.

TENTH CAUSE OF ACTION

(Negligent Infliction of Emotional Distress – Against All Individually Named Defendants)

177. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

178. By engaging in the acts alleged herein, the defendants engaged in negligent conduct and a willful violation of the laws of the State of California causing plaintiff to suffer serious emotional distress.

179. As a direct, proximate and foreseeable result, plaintiff suffered serious emotional distress and the outrageous conduct was the cause of the emotional distress suffered by plaintiff.

PRAYER

WHEREFORE, plaintiff prays for judgment as follows:

As to the First Cause of Action – Violation of Civil Rights – 42 U.S.C. 1983:

1. For special damages according to proof;
2. For general damages according to proof;
3. For prejudgment interest according to law;
4. For attorneys' fees pursuant to code;

5. For costs of this suit incurred herein; and

6. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to the Second Cause of Action – Conspiracy to Violate Civil Rights – 42 U.S.C. 1983:

1. For special damag s according to proof;

2. For general damages according to proof;

3. For prejudgment interest according to law;

4. For attorneys' fees pursuant to code;

5. For costs of this suit incurred herein; and

6. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to Third Cause of Action – Negligent Hiring, Retention and Promotion:

1. For special damages according to proof;

2. For general damages according to proof;

3. For prejudgment interest according to law;

4. For costs of this suit incurred herein; and

5. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to Fourth Cause of Action – Negligent Supervision:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to The Fifth Cause Of Action – Aiding and Abetting:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to The Sixth Cause Of Action – Aiding and Abetting:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As To The Seventh Cause Of Action – Civil Rights Violation [CC § 52.1]

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For punitive damages according to proof at the time of trial;

4. For attorneys' fees and costs of suit;

5. For prejudgment interest;

6. For civil penalties pursuant to statute; and

7. For any other relief this Court deems just and proper.

As to the Eighth Cause Of Action – Conspiracy to Violate CC § 52.1

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For punitive damages according to proof at the time of trial;

4. For attorneys' fees and costs of suit,

5. For prejudgment interest;

6. For civil penalties pursuant to statute; and

7. For any other relief this Court deems just and proper.

As to the Ninth Cause Of Action – Intentional Infliction of Emotional Distress:

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to the Tenth Cause Of Action – Negligent Infliction of Emotional Distress:

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

Dated: August 24, 2001

HOSEY & BAHRAMBEYGUI

By: /s/ Patrick L. Hosey
Patrick L. Hosey
Attorneys for Plaintiff
DAVID GENZLER

EDWARD PATRICK SWAN, JR., State Bar No. 089429
ROBERT L. YOUNG, State Bar No. 134849
TODD R. KINNEAR, State Bar No. 208831
Luce, Forward, Hamilton & Scripps LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Peter J. Longanbach

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID GENZLER, Plaintiff, v. PETER J. LONGANBACH, an individual; JEFFREY O'BRIEN, an individual; GREGORY THOMPSON, an individual; JAMES PIPPIN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive, Defendant.	Case No.: 01-CV-1462-K (JAH) The Hon. Judith N. Keep **DECLARATION OF PETER J. LONGANBACH IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION** (Filed Jun 11, 2002) [Fed. R. Civ. P. 56] Date: July 29, 2002 Time: 11:00 a.m. Department: 16 – Courtroom of the Honorable Judith N. Keep Trial Date: None

I, Peter J. Longanbach, hereby declare as follows:

1. I am a defendant in the above entitled action. The following is set forth of my own personal knowledge and if called upon to testify, I could and would do so competently.

2. I have reviewed plaintiff David Genzler's First Amended Complaint ("FAC") for damages, and I am familiar with its allegations. In particular, I am familiar with the allegations plaintiff makes that I influenced investigations in the Genzler criminal prosecution, altered investigative reports, hid, destroyed and tampered with evidence, and suborned perjury. As outlined below, nothing is further from the truth

3. During the time frame outlined by plaintiff's FAC, I was a Deputy District Attorney employed by the San Diego County District Attorney's Office, I served as a Deputy District Attorney for approximately 14-15 years. I am no longer employed as a Deputy District Attorney, or with the County of San Diego.

4. In the early morning hours of April 18, 1996, in the Ocean Beach area of San Diego, David Genzler stabbed and killed Dusty Harless. The next day, April 19, 1996, Genzler surrendered himself to the San Diego Police Department who arrested and booked him into the San Diego County Jail on one count of violating Penal Code section 187(a), murder.

5. Following Genzler's arrest, I was assigned by my supervisor in the San Diego District Attorney's Office to prosecute Genzler for the killing of Dusty Harless. By the time I became involved in the prosecution of Genzler, the initial investigation into the incident was complete. The police had conducted their own investigation into the crime, they had surveyed the crime scene, collected evidence, taken witnesses' statements, and conducted numerous

interviews of all those involved. Attached hereto as Exhibit A are true and correct copies of numerous police reports and investigation summaries conducted by those involved in the initial investigation of the Harless killing and arrest of Genzler prior to my involvement.

6. I am aware of the allegations in the FAC wherein plaintiff claims that I kept exculpatory evidence and documents from him and his defense attorney. This is false. Any evidence that I had in my possession, or had access to, was always turned over to defense counsel. At no time did I hide or keep any evidence related to the Genzler prosecution from the defense.

7. I am also aware of the allegations in the FAC that allege I presented false testimony to the jury. Again, this is false. At no time did I knowingly present false testimony to the Court or jury.

8. Plaintiff also bases his claim in part on my alleged actions of tampering with recorded witness statements and investigative reports, such as destroying the initial investigative report and having it redrafted without reference to the victim's prior street fights. At no time did I alter or destroy any evidence as plaintiff claims. Nor did I instruct Mr. O'Brien (an investigator with the District Attorney's Office), or anyone else to destroy any evidence, documents, or reports related to the Genzler prosecution.

9. In my role in preparing for the trial of Mr. Genzler, I spoke with a number of witnesses who would be testifying. My main purpose in doing so was to evaluate their testimony and the evidence in preparing for the court proceedings, such as the preliminary hearing, and criminal trial.

10. During my course of preparing for trial, I spoke with Sky Flanders, who witnessed the killing. Again, the purpose of meeting with Ms. Flanders was to evaluate her testimony, and prepare for Genzler's preliminary hearing and criminal trial.

11. I am aware that plaintiff, beginning on paragraph 66 of the FAC, alleges that during a meeting with her, Mr. O'Brien and I "told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past." This is untrue. At no time during any meeting with Sky Flanders did I tell Ms. Flanders that she needed to lie. I in no way told her to slant or color her testimony either. In fact, I told her numerous times that all she had to do was tell the truth.

12. Plaintiff also implies that I told Ms. Logel to perjure herself on the stand. As with Ms. Flanders, nothing could be further from the truth. I never told Ms. Logel to lie on the stand, or anywhere, to anyone. In fact, I told her numerous times that all she had to do was to tell the truth.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 11th day of June, 2002 at San Diego, CA.

/s/ Peter J. Longanbach
Peter J. Longanbach

EXHIBIT A

POLICE DEPARTMENT

NEWS RELEASE

CHIEF OF POLICE JERRY SANDERS

San Diego Police Department	1401 Broadway San Diego, CA 92101

DATE OF RELEASE: APRIL 16, 1996 (THURSDAY)

TIME OF RELEASE: 0615 HOURS

SAN DIEGO POLICE HOMICIDE DETECTIVES ARE INVESTIGATING A MURDER THAT OCCURRED IN THE OCEAN BEACH AREA.

AT ABOUT 0230 HOURS THIS MORNING, THE VICTIM AND HIS GIRLFRIEND WERE WALKING IN THE 5000 BLOCK OF VOLTAIRE. AS THEY WERE CROSSING CABLE STREET, THE SUSPECT, WHO WAS IN HIS CAR AT THE STOP SIGN, MADE COMMENTS TO THE FEMALE. THE VICTIM APPROACHED THE SUSPECT'S CAR WHEN THE SUSPECT EXITED HIS CAR AND HIT THE VICTIM, KNOCKING HIM TO THE GROUND. THE SUSPECT THEN JUMPED ON TOP OF THE VICTIM AND STABBED HIM IN THE CHEST.

A WITNESS PULLED THE SUSPECT OFF THE VICTIM AND THE SUSPECT TURNED ON THE WITNESS. THE WITNESS RETREATED TO HIS VEHICLE AND THE SUSPECT FOLLOWED HIM. THE SUSPECT ATTEMPTED TO GET IN THE WITNESS' VEHICLE AND THE WITNESS BACKED AWAY. THE SUSPECT THEN RETURNED TO HIS OWN CAR AND DROVE AWAY.

WITNESSES ADMINISTERED C.P.R. TO THE VICTIM UNTIL PARAMEDICS ARRIVED. THE VICTIM WAS TRANSPORTED TO U.C.S.D. MEDICAL CENTER WHERE HE EXPIRED SHORTLY AFTER ARRIVAL. THE VICTIM'S IDENTITY IS BEING WITHHELD UNTIL HIS FAMILY HAS BEEN NOTIFIED.

WITNESSES PROVIDED INVESTIGATORS WITH SUSPECT AND VEHICLE DESCRIPTIONS AND A LICENSE PLATE NUMBER. INVESTIGATORS ARE FOLLOWING UP ON THAT INFORMATION AT THIS TIME.

FOR FURTHER INFORMATION AS IT DEVELOPS, CONTACT LIEUTENANT JIM COLLINS, HOMICIDE SECTION, 531-2275.

WHITE MALE, 25 YEARS OLD, 6' 3", 180 LBS. WITH A SMALL GOATEE AND MUSTACHE. HE WAS WEARING A BLUE AND YELLOW PLAID SHIRT, BLUE JEANS, BLACK COMBAT BOOTS AND WIRE RIM PRESCRIPTION GLASSES.

ANY NEWS MEDIA AGENCY THAT OBTAINS A PHOTO OR VIDEO TAPE OF GENZLER IS ASKED NOT TO AIR OR PRINT SAID VIDEO TAPE OR PHOTO UNTIL THE WITNESSES HAVE HAD AN OPPORTUNITY TO VIEW A LINE-UP OF THE SUSPECT.

FOR FURTHER INFORMATION AS IT DEVELOPS CONTACT LIEUTENANT JIM COLLINS, HOMICIDE SECTION, 531-2275.

CITY OF SAN DIEGO

POLICE DEPARTMENT

NEWS RELEASE

CHIEF OF POLICE JERRY SANDERS

San Diego Police Department	1401 Broadway San Diego, CA 92101

DATE OF RELEASE: APRIL 18, 1996

TIME OF RELEASE: 1630 HOURS

SAN DIEGO POLICE HOMICIDE DETECTIVES ARE ASKING FOR ASSISTANCE FROM THE PUBLIC IN LOCATING A SUSPECT AND VEHICLE FROM A HOMICIDE IN THE OCEAN BEACH AREA.

DUSTIN ERIC HARLESS (25) WAS STABBED TO DEATH AT THE INTERSECTION OF VOLTAIRE AND CABLE STREETS AT ABOUT 0230 HOURS THIS MORNING. HARLESS AND HIS GIRLFRIEND WERE WALKING IN THE AREA WHEN THE SUSPECT STOPPED HIS CAR AT THE INTERSECTION. THE SUSPECT MADE A COMMENT TO THE FEMALE AND HARLESS APPROACHED THE SUSPECT'S CAR. THE SUSPECT EXITED HIS CAR, KNOCKED HARLESS TO THE GROUND AND STABBED HIM.

A WITNESS PULLED THE SUSPECT AWAY FROM HARLESS AND WAS THEN THREATENED BY THE SUSPECT. THE SUSPECT FLED FROM THE SCENE IN HIS CAR.

HARLESS WAS TRANSPORTED TO U.C.S.D. MEDICAL CENTER BY PARAMEDICS BUT EXPIRED SHORTLY AFTER ARRIVAL.

THE SUSPECT IS A CAUCASIAN MALE, ABOUT 25 YEARS OLD, 6 FT.+, THIN BUILD, WITH BLONDE HAIR AND A SHORT GOATEE. THE VEHICLE IS A 1990 HYUNDAI, SILVER OR GOLD IN COLOR, WITH CALIFORNIA LICENSE PLATE 2UCA167.

ANYONE WITH INFORMATION ON THE LOCATION OF THE VEHICLE OR IDENTITY OF THE SUSPECT IS ASKED TO CALL THE SAN DIEGO POLICE DEPARTMENT AT 531-2000 OR CRIME STOPPERS AT 531-TIPS (531-8477).

FOR FURTHER INFORMATION AS IT BECOMES AVAILABLE, CONTACT LIEUTENANT JIM COLLINS, HOMICIDE SECTION, 531-2275.

San Diego Police Department
Homicide Division Callout Sheet
Victim: HARLESS, Dustin Eric
Case #96-026516

INVESTIGATIVE PERSONNEL

HOMICIDE
PERSONNEL: Lieutenant COLLINS, Sergeant MARTIN
Detectives CRISTINZIANI, JACKSON,
TORGERSEN, and DURAN (Relief) TEAM: III
EVID TECH: AVERY CRIMINALIST: ____ DDA: ____
MEDICAL EXAMINER: ____ INVESTIGATOR: BOLTON
CANCELLED BY: ____ DATE: ____ TO RECORDS: ____

CASE SYNOPSIS/REVISIONS:

At about 0235 hours on April 18, 1996, HARLESS and his girlfriend, Sky FLANDERS, were walking westbound on the north sidewalk of Voltaire Street at Cable Street. HARLESS stopped at the east corner to button his jacket. FLANDERS continued to the west corner where she stopped and waited for HARLESS. A small sedan, described as either silver, light gold or possibly blue, stopped at the limit line for the stop sign on Cable Street at Voltaire Street. The driver rolled down the passenger window of the car and asked FLANDERS if she wanted a ride. HARLESS was crossing the street as this occurred. He walked to the driver's window of the sedan and told the driver, "That's my girlfriend." The driver got out of the car and started a fight with HARLESS. During the fight, the suspect stabbed HARLESS in the chest.

Scott DAVIS was driving his vehicle southbound on Cable Street. He drove up behind the sedan and saw the fight.

He got out of his van to attempt to stop the fight. As DAVIS went towards the fight, he saw the suspect punch the victim. The victim fell to the ground. The suspect bent over and held the victim down with his left hand and stabbed the victim with the knife he was holding in his right hand. DAVIS grabbed the suspect, pinning the suspect's right arm and hand to his side. He pulled the suspect off the victim and threw him to the ground next to the sedan. DAVIS turned back to the victim and saw him get up from the ground and start to walk away. He said the victim was spurting blood from the wound in his chest.

DAVIS turned back toward the suspect, who was also back on his feet. The suspect was holding the knife in his right hand. He had his arms outstretched and was threatening DAVIS, asking him if he wanted any of this (referring to the knife). He advanced towards DAVIS, slashing the knife in the air at him. DAVIS backed around the sedan and was able to get into his van and lock the doors. The suspect hit and kicked the van and jumped onto the hood, hitting the window with his hand. DAVIS backed his van abruptly, causing the suspect to fall from the hood. DAVIS drove away and went to a nearby store where he called the police on the 911 emergency telephone line. He returned to the scene.

HARLESS was taken to UCSD Hospital, where he was declared dead at 0314 hours by Dr. SIMONS.

FLANDERS wrote the license number of the suspect vehicle on a business card. The license, 2UCA167, is registered to Barbara GENZLER of 41451 Cour Beaune, Temecula, California.

The weapon is a knife with a curved blade about four inches long. It is possibly a folding knife with a silver blade and a black handle.

On April 19, 1996, at about 1300 hours, Detective CRISTINZIANI received a page to call Attorney HOWLETT, whose office is located at 600 B Street, Suite 1950. Detective CRISTINZIANI called the office and spoke with Attorney HOWLETT, who told him that David GENZLER was in his office and was available for us to talk to about the murder of Dustin HARLESS. On arrival at the attorney's office, at about 1335 hours, GENZLER surrendered himself and the attorney admonished him not to talk about the case. GENZLER was transported to the homicide office, where he refused to make a statement. He was booked into jail on one count of murder.

Reporting Officer: Sergeant L. D. Martin, ID #1591

Date of Report: 04/24/96/kc

Date of Revisions: _____

SAN DIEGO POLICE DEPARTMENT
HOMICIDE DIVISION CALLOUT SHEET

DATE/TIME: 04/18/96 @ 0237 Hours (Thursday)
LOCATION: 2200 Cable Street

AREA: Western BT 612

CASE TYPE/#: 187(a) PC, Murder, #96-026516

RELATED CASE TYPE/# _____ INCIDENT # P96-040035790

WEAPON: Knife METHOD OF DEATH: Stabbed Victim

MOTIVE: Anger

VICTIM(S)

NAME: HARLESS, Dustin Eric

NICKNAME: _____ RACE: W SEX: M

HGT: 5'8" WGT: 170

AGE: 25 DOB: 08-24-70 OCCUPATION _____

IDENTIFICATION:

SSN: 556-29-7625 CDL: A1468989 FBI: ___ CII: ___

HOME ADDRESS: 2530 Galveston Street, San Diego, CA 92110

HOME PHONE: _____

EMPLOYER(S): _____ WORK PHONE:

_____ _____

NAME: _____

NICKNAME: _____ RACE: ___ SEX: ___

HGT: ____ WGT: ___

AGE: ____ DOB: _____ OCCUPATION: _____

IDENTIFICATION:

SSN: _____ CDL: _____ FBI: ___ CII:___

HOME ADDRESS: _____

HOME PHONE: _____

EMPLOYER: _____ WORK PHONE:

_____ _____

SUSPECT(S)

NAME: GENZLER, David James

NICKNAME: _____ RACE: W SEX: M

HGT: 6'2" WGT: 180

AGE: 25 DOB: 11-03-70 OCCUPATION: Student-SDSU

IDENTIFICATION:

SSN: 551-81-3754 CDL: U6027359 FBI: ___ CII:___

HOME ADDRESS: 7217 Arillo Street, San Diego, CA 92111

HOME PHONE: _____

EMPLOYER: _____ WORK PHONE:

_____ _____

ARREST DATE: 04/19/96 CHARGES: 187(a)PC

WARRANT: _____

NAME: _____

NICKNAME: _____ RACE: ___ SEX: ___

HGT: ____ WGT: _____

AGE: ____ DOB: _____ OCCUPATION: _____

IDENTIFICATION:

SSN: _____ CDL: _____ FBI: __ CII:___

HOME ADDRESS: _____

HOME PHONE: _____

EMPLOYER: _____ WORK PHONE:

_____ _____

ARREST DATE: _____ CHARGES: __ _____

WARRANT: _____

_____

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder-SDPD Case #96-026516

VICTIM:	HARLESS, Dustin Eric W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110

CRIME SCENE:

On April 18, 1996, at approximately 0335 hours, I received a telephone call at home from Sergeant L. D. MARTIN. Sergeant MARTIN advised me that a fatal stabbing had just occurred and directed me to respond to the intersection of Cable Street and Voltaire Street to conduct an investigation. I arrived at the scene at approximately 0440 hours. While driving to the scene, I noted that the traffic conditions were very light, it was raining, and the temperature was approximately 53 degrees.

Upon my arrival at the scene, I joined Lieutenant J. COLLINS and Detective R. JACKSON. We were joined a short time later by Sergeant MARTIN, Detective T. TORGERSEN, Detective J. DURAN and Evidence Technician G. AVERY. The scene was secured by yellow police tape and uniformed police personnel. A uniformed officer was posted at the intersection of Cable and Voltaire Streets, an officer was posted mid-block 2200 Cable Street

at the entrance to the north alley of 4900 Voltaire Street and there was an officer posted on the street in front of 4912 Voltaire Street where evidence lay on the sidewalk.

Upon the arrival of Homicide Team III members, we were briefed on the incident by Sergeant J. CROCKETT, ID #3760. During the briefing, Sergeant CROCKETT advised us that a witness had obtained the suspect vehicle license plate number. That plate number was recorded as 2UCA167 (California). At the conclusion of the briefing, Sergeant MARTIN directed Evidence Technician AVERY and me to conduct the crime scene investigation.

The scene was located in the middle of 2200 Cable Street at the intersection of 4900 Voltaire Street. After the initial stabbing, eye witnesses reported that the victim staggered west, on the north sidewalk of 4900 Voltaire Street from 2200 Cable Street. The victim fell to the sidewalk in front of the Surf Shop located at 4912 Voltaire Street. The victim was at that location when paramedic unit #108 arrived and began medical intervention. The victim was immediately transported to UCSD Medical Center, where he was pronounced dead at 0314 hours by Dr. SIMONS.

This area of Ocean Beach is primarily a business district. The scene is bordered by 2200 Sunset Cliffs Boulevard to the east, 2200 Bacon Street to the west, 4900 Voltaire Street to the south, and the north alley of 4900 Voltaire Street to the north.

Upon the arrival of Homicide Team III members, the decedent had already been removed from the scene. Medical Examiner Investigator BOLTON responded to UCSD Medical Center and took charge of the decedent. The decedent was placed into a white plastic pouch and at 0435 hours on April 18, 1996, BOLTON sealed the pouch

with a locking red tag, #954969. A blue tag was also placed on the pouch with the Medical Examiner's case number of #96-0794.

The initial scene was located in the middle of 2200 Cable Street approximately 20' east of the west curb line of 2200 Cable Street. The north and south travel lanes are divided by a solid double yellow line. No red stain was noted at that location. Scattered throughout the street, as well as the east curb line and parkway area of 2200 Cable Street, were several broken pieces of Heineken beer bottles. Leading south from the entrance to the north alley of 4900 Voltaire Street, on the west sidewalk of 2200 Cable Street, were two closed businesses. The first business was the Master Italian Deli located at 2218 Cable Street. The second business to the south is the Audio/Video Workshop located at 2216 Cable Street. The Audio/Video Workshop extends around the corner to the west and extends onto the north sidewalk of 4900 Voltaire Street. West of, and next to the Audio/Video Workshop, is Lucy's Bar located at 4906 Voltaire Street. West of Lucy's Bar is the Surf Shop. The Surf Shop is a large building and has two addresses, 4912 Voltaire Street and 4914 Voltaire Street.

On the north sidewalk of 4900 Voltaire Street, directly in front of 4912 Voltaire Street, was a large puddle of red stain. There was also what appeared to be one black jacket, one brown blanket, a red-stained pair of pants, a red-stained shirt, and debris of medical intervention. On the sidewalk at the northwest corner of Cable and Voltaire Streets were three red stain spots.

The following items of evidence were collected:

Item #1: Red stain sample on a piece of apparent tissue; located 10' 1" west of the west curb line of 2200

Cable Street, and 3'9" north of the north curb line of 4900 Voltaire Street. Believed to be the decedent's blood.

Item #2: Red stain sample: located 12'10" west of the west curb line of 2200 Cable Street, and 5'6" north of the north curb line of 4900 Voltaire Street. Believed to be the decedent's blood.

Item #3: Red stain sample: located 16'9" west of the west curb line of 2200 Cable Street, and 4' north of the north curb line of 4900 Voltaire Street. Believed to be the decedent's blood.

Item #4: Red-stained pants: located 63'10" west of the west curb line of 2200 Cable Street, and 9'2" north of the north curb line of 4900 Voltaire Street. Believed to be stained with the decedent's blood.

Item #5: Two black jackets with red stain: located 67'1" west of the west curb line of 2200 Cable Street, and 8' north of the north curb line of 4900 Voltaire Street. The jackets were used to cover the decedent.

Item #6. One brown blanket: located 68'7" west of the west curb line of 2200 Cable Street, and 8'5" north of the north curb line of 4900 Voltaire Street. The blanket was used to cover the decedent.

Item #7: Red-stained shirt: located 68'9" west of the west curb line of 2200 Cable Street, and 6'10" north of the north curb line of 4900 Voltaire Street. Believed to contain blood from the decedent.

Following the collection of evidence, the scene was again examined for additional evidence. Finding no additional

pertinent evidence, AVERY and I secured from the crime scene at approximately 0715 hours.

Reporting Officer: ID# 2913
Joseph CRISTINZIANI, Detective Homicide Team III

Approved By Martin 1591 Date of Report ___ Time Hours

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder-SDPD Case #96-026516

VICTIM:	HARLESS, Dustin Eric W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110

MORGUE SCENE:

On April 18, 1996, at approximately 1000 hours, Evidence Technician Gary AVERY and I viewed the decedent who was lying supine on a table in an examining room at the San Diego County Medical Examiner's Office. At that time, the decedent was encased in a white plastic zippered body bag. The body encased in the bag was identified in writing by a Medical Examiner's blue identification band, bearing the name of Dustin HARLESS and Medical Examiner's case number 96-0794, attached to the bag. The bag was secured by a red plastic seal, bearing the number 954969.

Doctor EISELE, a deputy medical examiner pathologist, was to perform the autopsy. Doctor EISELE was assisted by Forensic Autopsy Assistant Russell PRYOR, Sr.

At approximately 1010 hours, AVERY began taking overall photographs of the body bag while the decedent was still

encased in it. PRYOR then broke the seal to the bag and removed the decedent. The decedent was found unwrapped. AVERY collected the plastic bag that contained the decedent's clothing. That plastic bag was encased in the white plastic body bag. The decedent was not dressed and was nude. There were paper bags covering the decedent's head, hands and feet. The following items were collected by AVERY: a pair of blue jeans, a brown leather belt, a green and tan short-sleeve shirt, a red-stained t-shirt, and one red-stained white towel.

According to Doctor EISELE, medical intervention to the decedent was indicated by an oral trachea tube and EKG pads.

At approximately 1025 hours, Doctor EISELE removed the paper bags from the decedent's head, hands and feet. The clothing was examined by Doctor EISELE. Doctor EISELE noted that the clothing had been cut for medical intervention purposes.

Once the clothing was examined, AVERY collected it for evidence. At this time, the medical intervention equipment was removed from the decedent and disposed of by Doctor EISELE. AVERY then took photographs of the decedent in the unclothed, unwashed condition.

At approximately 1035 hours, AVERY collected head hair from the decedent.

At approximately 1037 hours, AVERY collected body hair from the decedent

At approximately 1040 hours, AVERY collected fingernail scrapings from the decedent.

At approximately 1045 hours, AVERY collected pubic hair from the decedent.

The decedent was a white male appearing consistent with the stated age of 25 years. He was approximately 68" long and weighed approximately 175 pounds. He had blond-colored hair and hazel-colored eyes. The decedent's hair was medium length. He had a groomed goatee.

The viewing commenced with the decedent's head and face. He had four separate areas of abrasions on the left side of his face and neck.

The chest was viewed. A single puncture wound was found 53" above the decedent's heels. The wound was approximately 1½" long.

The abdomen was viewed. A scratch on his right side was noted.

The right arm was viewed. There was one abrasion on the knuckle of the decedent's right hand.

See Doctor EISELE's report for precise measurements and description of the trauma, and exact cause of death.

At this point, the viewing of the decedent was concluded and Doctor EISELE proceeded with the autopsy. AVERY made arrangements to collect any evidence recovered from the decedent. At approximately 1105 hours, AVERY and I cleared from the Medical Examiner's Office.

Reporting Officer Joseph CRISTINZIANI, Detective	ID# 2913 Homicide Team III
Approved By Martin 1591	Date of Report 04/23/96/kc Time 0630 Hours

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder-SDPD Case #96-026516

VICTIM:	HARLESS, Dustin Eric W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110
SUSPECT:	GENZLER, David James W/M (25) DOB: 11-03-70 SSN: 551-81-3754 CDL: U6027359 7217 Arillo Street San Diego, CA 92111 Student: San Diego State University

ARREST OF DAVID GENZLER:

On April 19, 1996, at approximately 1315 hours, I received a page. Upon calling the number, I was informed that I had reached the Law Offices of Hank HOWLETT. I identified myself and the receptionist put me through to Attorney HOWLETT. I identified myself to HOWLETT and he stated that David GENZLER was in his office. HOWLETT stated that he understood I wanted to speak with GENZLER. I told him I did. HOWLETT advised me that GENZLER had been in his office since early that morning

and was still in a state of shock over the incident that occurred the night before (murder of Dustin HARLESS).

I told HOWLETT that I would be happy to respond to his office or he could bring GENZLER to my office. He stated that it did not matter to him but he was leaving shortly to catch a flight to Nevada. I told him I would speak to my supervisor and call him back.

I advised Sergeant L. D. MARTIN of my telephone conversation with HOWLETT. Sergeant MARTIN stated that he would accompany me to HOWLETT's office. I telephoned HOWLETT and told him that Sergeant MARTIN and I would be at his office shortly.

HOWLETT advised me not to question his client. I advised HOWLETT that he could not invoke the rights of his client, that only GENZLER could make that choice. HOWLETT again told me not to question his client. I asked HOWLETT what he suggested and he stated, "Take him into custody and give him an arraignment date and you can talk to him when I'm present. I just can't have you talk to him today because I am going out of town and I can't be present for the interview."

Sergeant MARTIN and I went to HOWLETT's office. We introduced ourselves and after speaking with HOWLETT for a short time, I took GENZLER into custody and transported him to the San Diego Police Department homicide office at 1401 Broadway.

GENZLER was processed and charged with one count of violation of section 187(a) PC. Prior to being transported to County Jail, GENZLER's father arrived at the homicide office. He requested to spend a few moments with his son before his son was booked into jail. Sergeant MARTIN allowed Mr. GENZLER to visit his son. That visit was video

and audio taped in its entirety, as was my contact with GENZLER. After the visit was concluded, David GENZLER was transported and booked into San Diego County Jail.

Reporting Officer /s/ Joseph Cristinziani ID# 2913
Joseph CRISTINZIANI, Detective Homicide Team III

Approved By Date of Report 04/30/96/kc
R. Jackson 1463 A/SG1 Time 0615 Hours

SAN DIEGO POLICE DEPARTMENT
ARREST / JUVENILE CONTACT REPORT

REPORT: ARREST REPORT; ARREST/JUVENILE CONTACT; NOTIFY WARRANT; WARRANT: ☐ LOCAL ☐ OUT; AGENCY: SDPD; ARJIS ASSIGNED: ☑ ☐; PAGE: 1 OF; ARREST DATE: 4-19-96; TIME: 1345; BEAT/DISTRICT: 524; RELATED REPORTS (TYPE, NUMBER): 96-026516; AGENCY NUMBER; SDPD BOOKING NUMBER; CITATION NUMBER

ARRESTEE – CRIME

CHARGE(S): 187 (a) PC MURDER; ADDT'L CHGS ☐; ADULT RELEASED OR ☐ 849PC ☐ ☐

PERSON ARRESTED (L,F,M): GENZLER, David James

NICKNAME	RACE	SEX	AGE	D.O.B.	P.O.B.	HT.	WT.	BUILD	HAIR	EYES
	W	M	26	1-03-70	San Diego, CA	6-2	180	Thin	Brn	Blu

ALIAS/MAIDEN NAME (L,F,M): ; ARRESTEE'S ADDRESS: Refused; CITY; HOME PHONE: 278-7517

MILITARY: YES ☐; OCCUPATION/RANK: Student; EMPLOYER/SCHOOL: SDSU; ADDRESS; CITY; BUS. PHONE

EMERGENCY CONTACT/NEXT OF KIN (L,F,M): GENZLER, Barbara; ADDRESS: 41451 Cour Beaume; CITY: Temecula, CA; HOME PHONE: (909)699-9644

IS SUBJECT A SUSPECTED USER OF NARCOTICS/DRUGS? YES ☐; INTERPRETER REQUIRED? YES ☐; LANGUAGE; SUSPECT'S RELATION TO VICTIM(S): RELATIVE ☐ ACQUAINTANCE ☐ STRANGER ☐

LOCATION OF ARREST: 600 B Street; CITY: S.D.; LOCATION OF OFFENSE: Cable St. at Voltaire; CITY; OFFENSE DATE: 4-18-96; OFFENSE TIME: 0237

CITIZEN ARREST? YES ☐; ARRESTING OFFICER: Cristianiani; I.D.: 2913; ADMONISHED BY: Jackson 1463; DO YOU UNDERSTAND EACH OF THESE RIGHTS THAT I HAVE EXPLAINED TO YOU? Yes

HAVING IN MIND AND UNDERSTANDING YOUR RIGHTS AS I HAVE TOLD YOU, ARE YOU WILLING TO TALK WITH US? No; STATEMENT YES ☐

ARRESTEE DESCRIPTION

HAIR LENGTH/TYPE	HAIR STYLE	FACIAL HAIR	COMPLEXION	SPEECH	VOICE
1 BALD 2 COLLAR 3 LONG 4 NECK 5 SHORT 6 SHOULDER 7 COARSE 8 FINE 9 THICK 10 THINNING 11 WIRY 12 OTHER:	1 AFRO/NAT. 2 BRAIDED 3 BUSHY 4 GREASY 5 MILITARY 6 PONYTAIL 7 PROCESSED 8 STRAIGHT 9 WAVY/CURLY 10 WIG 11 OTHER:	1 CLEAN SHAVE 2 FULL BEARD 3 FU MANCHU 4 GOATEE 5 LOWER LIP 6 MUSTACHE 7 NONE/FUZZ 8 SIDEBURNS 9 UNSHAVEN 10 VAN DYKE 11 OTHER:	1 ACNE 2 DARK 3 FRECKLED 4 LIGHT 5 MEDIUM 6 PALE 7 PITTED 8 RUDDY 9 SALLOW 10 TANNED 11 OTHER:	1 ACCENT 2 LISPS 3 MUMBLES 4 OFFENSIVE 5 QUIET 6 RAPID 7 SLOW 8 STUTTERS 9 TALKATIVE 10 OTHER:	1 DISGUISED 2 HIGH PITCH 3 LOUD 4 LOW PITCH 5 MEDIUM 6 MONOTONE 7 NASAL 8 PLEASANT 9 RASPY 10 SOFT 11 OTHER:
5 3	8	6 9 10	5	5	5

IDENTIFICATION NUMBERS: DRIVER'S LICENSE NO. U6027359 STATE CA; SOCIAL SECURITY NO. 551-81-3754; FBI NO.; CII NO.; OTHER I.D. TYPE; UNDOCUMENTED PERSON YES ☐

FURTHER SUSPECT DESCRIPTION (I.E., GLASSES, TATTOOS, VESTS, BIRTHMARKS, JEWELRY, SCARS, MARKS/BRANDS, ETC.): Wire Rim Glasses

CLOTHING DESCRIPTION: Blue plaid L/S Shirt, Blue T-Shirt, Blue Jeans

SUSPECT VEHICLE: YEAR; MAKE; MODEL; COLOR/COLOR; BODY TYPE; LICENSE NO.; STATE

ADDITIONAL VEHICLE IDENTIFIERS (CHROME, DAMAGE, ETC.); VIN NUMBER; DISPOSITION OF VEHICLE

REGISTERED OWNER (L,F,M); ADDRESS; CITY

PROPERTY TAG NO.; DISPOSITION OF EVIDENCE

VICTIM / COMPANY / EVID.

1ST NAME (L,F,M)	ADDRESS	CITY	PHONE	RACE	SEX	AGE	D.O.B.	ARRESTED	ADDT'L CO-DEFENDANTS LISTED
								YES ☐	YES ☐

2ND NAME (L,F,M)	ADDRESS	CITY	PHONE	RACE	SEX	AGE	D.O.B.	ARRESTED	ADDT'L CO-DEFENDANTS LISTED
								YES ☐	YES ☐

NAME (L,F,M)	RES. ADDRESS	CITY	HOME PHONE
HARLESS, Dustin	2530 Galveston St.	SD	275-4617

BUS. ADDRESS	CITY	BUS. PHONE	RACE	SEX	D.O.B.	ADDT'L VIC./WIT.
			W	M	3-26-70	YES ☐

REPORTING OFFICER	I.D.	DIVISION	REPORT DATE	TIME	REPORT APPROVED	I.D.	BOOKING APPROVED
Terry Torgersen	1979	Hom Tm III	4-19-96	1530	MARTIN	1591	000027

PD-8 (Rev. 8/92)

App. 122

JUVENILE ONLY

FATHER/STEPFATHER'S NAME (L,F,M)	ADDRESS	CITY	HOME PHONE	BUS. PHONE

MOTHER/STEPMOTHER'S NAME (L,F,M)	ADDRESS	CITY	HOME PHONE	BUS. PHONE

SCHOOL	GRADE	PARENTS NOTIFIED BY: WHOM AND HOW	DATE	TIME

LIVES WITH	RELEASE DATE	TIME

FIELD DISP.: 1 - JUVENILE HALL 2 - OTHER POLICE AGENCY: _____ 3 - OTHER: _____

ATTITUDE OF JUVENILE AND PARENTS/GUARDIAN

DET. DISPO.: 1 - REFER COURT/PROB 2 - DEPT. DIVERSION 3 - COUNSEL/INFORMAL 4 - OTHER _____

Charges: CENZLER was arrested for the stabbing Death of Duecia HARLESS.

SEE FOLLOW UP INVESTIGATION FOR DETAILS

CITIZEN ARREST

I have arrested _____

☐ For a public offense committed or attempted in my presence.

☐ When the person arrested has committed a felony, although not in my presence.

☐ When a felony has been in fact committed, and I have reasonable cause for believing the person arrested to have committed it.

I know that pursuant to Section 848 of the Penal Code of the State of California, it is necessary for me to sign a complaint stating the charge against the prisoner, which complaint must be made before a magistrate, and I agree to sign said complaint and appear in said matter without delay.

Date: _____ Signed _____

ARRESTING CITIZEN (L,F,M) PRINT	RES. ADDRESS	CITY	HOME PHONE

BUS. ADDRESS	CITY	BUS. PHONE	RACE	SEX	D.O.B.

ADULT ONLY

Check each reason for not releasing the subject with a written notice to appear.

(ADULTS ONLY)

☐ 1. The person arrested was so intoxicated that he could have been a danger to himself or to others.

☐ 2. The person arrested required medical examination or medical care or was otherwise unable to care for his own safety.

☐ 3. The person was arrested for one or more of the offenses listed in section 40302 of the vehicle code.

☐ 4. There were one or more outstanding warrants for the person.

☐ 5. The person could not provide satisfactory evidence of personal identification.

0000028

☐ 6. The prosecution of the offense(s) for which the person was arrested or the prosecution of any other offense(s) would be impaired by immediate release of person arrested.

☐ 7. There was a reasonable likelihood that the offense(s) would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

☐ 8. The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

☐ 9. Any other reason: _____

App. 123

OFFICERS (Except FEDERAL) Complete This Section

NAME (LAST, FIRST, MIDDLE): GENZLER, David James

FOR JAIL USE ONLY

CHARGES (CODE AND DESCRIPTION): 187(a) PC MURDER

SEX	RACE	DATE OF BIRTH	AGE	HEIGHT	WEIGHT	HAIR	EYES
Male	White	1-3-70	26	6-2	180	Brn	Blu

LOCATION OF ARREST: 680 B Street SD

ARREST AGENCY: SDPD

COUNTY: SD Muni

DATE AND TIME OF COURT APPEARANCE:

BOOKING AND VERIFIED LOCATION:

FINAL PLEA:

VICTIM: ARRESTING OFFICER: Torgerson 1979

BAIL: $

BAIL OR RELEASE: $

OCCUPATION — NAME ADDRESS — TELEPHONE NUMBER: Student Transient

YOA: San Diego

CII/FBI: 06027359CA

SOC: 551813734

DISTRIBUTION (3 cts.) White—Jail with CHARGE OR DROP CHARGE / Canary—Booking (Full cts.) Pink—Agency / White—Cont. Info. Canary—Agency (Disp. Rpt.)

JAIL WILL BOOK ON ABOVE CHARGES. FURNISH JAIL WITH CHANGE OF CHARGE OR DROP CHARGE.

PLEASE PRINT ALL ENTRIES

I. Describe as briefly as possible the circumstances of the offense(s):

On 4-18-96 Dustin HARKESS was stabbed to death during an altercation in the street. Witnesses at the scene provided a description of the suspect and the license plate number to the suspects vehicle.

On 4-19-96 GENZLER turned himself in to the police through his attorney. GENZLER refused to talk with the police and was processed and the booked into County Jail.

-AS APPROPRIATE, CHECK BOXES, CIRCLE ITEMS AND FILL IN BLANKS BELOW.

II. Was Suspect ARMED: [X] During Offense [ ] When Arrested
(APDW: Handgun Rifle Shotgun (Knife) Club
Other

III. Did Suspect RESIST ARREST? YES (NO)
Describe:

IV. Is Suspect HABITUAL NARCOTICS USER? YES NO (UNK.)
How was determined?

V. If ASSAULT Involved (Complete the following section):
A. Type: 187 PC - Stabbing
B. Reason (If known):
C. Victim(s) Number: 1
Age: 25 Sex: M
Relationship to Suspect:
D. Injuries:
None Minor Moderate (Major)
E. Weapons:
Handgun Rifle Shotgun (Knife) Club
Other:
Firearm Discharged During Crime or Apprehension?
YES (NO)

VI. If THEFT or STOLEN PROPERTY (Complete following section):
A. Type:
B. Victim(s):
Person Residence Commercial
Other:
C. Property taken:
Approx. Value:
D. Property Recovered: None Partial Full

VII. If CONTROLLED SUBSTANCES (Complete following section):
A. Type:
B. Amount:
C. If suspect "dealing", how much?
Minor (Small/Irregular) Moderate (Med./Regular) Major (Large/Frequent)

VIII. Remarks:

1979 (Badge No.) [signature] (Signature) 4-19-96 (Date)

000029

DISPOSITION CODE:

Form J-15A (Rev. 7/89)

App. 124

DECLARATION AND DETERMINATION

AGENCY NUMBER	
WARRANT ☐ LOCAL ☐ OUT	AGENCY SDPD
AR/IS ASSISTED? ☑ ☐	PAGE 1 OF
SDPD BOOKING NUMBER	
ARREST DATE 4-19-96	TIME 1345
BEAT/SECTOR/DIV	RELATED REPORTS (TYPE, NUMBER) 96-026516
CITATION NUMBER	

CHARGE(S)	ADULT RELEASES
187 (a) PC MURDER	OR ☐ 849Pc 81 ☐ 85 ☐

PERSON ARRESTED (L,F,M)	ADDTL CHGS.
GENZLER, David James	

NICKNAME	RACE	SEX	AGE	D.O.B.	P.O.B.	HT.	WT.	BUILD	HAIR	EYES
	W	M	26	1-03-70	San Diego, CA	6-2	180	Thin	Brn	Blu

FACTS ESTABLISHING ELEMENTS OF CRIME AND IDENTIFICATION

On 4-18-96 at approximately 0235 Dustin HARLESS was stabbed to death during an altercation in the street at Cable and Voltaire. Witnesses at the scene obtained a license plate number to the suspects vehicle. A DMV check showed the vehicle registered to a Barbara GENZLER in Temecula, CA. Ms GENZLER stated that her son David GENZLER was the person that was using the car. Attempts to l.cate David GENZLER were negative. GENZLER'S physical description fits that of the suspect according to the mother.

On 4-19-96 an Attorney called the San Diego Police Homicide Unit and stated that David GENZLER wanted to turn himself in at the attorney's office. Officers took GENZLER into custody at the attorneys office.

GENZLER was admonished and refused to discuss the case. GENZLER was processed and taken to Jail.

Witnesses at the scene described the suspect as: W/M 20's Over 6-, thin, Brn Collar length Hair, short/thin mustache and goatee wearing wire frame glasses, Wht t-shirt green shorts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on 4-19-96 in the County of San Diego, State of California.

By _____ #1779 (Declarant's Signature)

On the basis of the foregoing Declaration, I hereby determine that there:

IS ☐ IS NOT ☐

Probable cause to believe this arrestee has committed a crime.

_____ (Date) _____ (Time) _____ (Magistrate's Signature)

BY _____ (Telephonic)

000930

App. 125

Mail Station 713
Best of Arrest
☒ Age 21 or over
☐ Under age 21

SAN DIEGO POLICE DEPARTMENT
FORENSIC SCIENCE SECTION

INTOXILYZER, MODEL 5000 – PRECAUTIONARY CHECKLIST

GENZLER, DAVID J	.M	11/3/70	1897
1-96-2924	1727	1729	

I. ANALYSIS (Mark ALL boxes as you complete each step.)

A. ☑ Subject continuously observed at least 15 minutes prior to test and did not ingest alcoholic beverages or other fluids, regurgitate, vomit, eat or smoke.

B. ☑ Record Alcohol Vapor Reference Sample (AVRS) value, breath ID# on both checklist and test record card.

C. ☑ Test Record Card filled out.

D. ☐ Verify power is on and instrument ready (a ready indication message scrolling across screen).

E. ☑ Push green button (start test button) then insert the test record card into the slot, top of card in and facing up.

F. ☑ Air Blank, Record result here .00 If value is not .00 – void test and restart a new test or choose another sample.

G. ☑ Immediately attach the AVRS tube to the calibration port and when the calibration cycle activates; depress the AVRS valve and hold it down until the pump cycle ends. Record the Alcohol Vapor Reference Sample (AVRS) value here .14 (AVRS value must be ± .01 of the value recorded in the AVRS box at the top of the checklist, If not void test.)

H. ☑ Air Blank, Record Result here .00 (If value is not .00 – void test, see Step F).

I. ☑ Install mouthpiece on breath hose. (Note: Use a clean mouth piece for each test.)

J. ☑☑☐ Instruct the subject to blow a proper sample into the instrument (continuous breath, keeping tone sounding). Record the 1st breath test result here .09, 2nd breath result .09, 3rd breath result (if needed) ____.

K. ☑☑☐ Air Blank 1st result .00, 2nd result .00, 3rd result (if needed) ____. (All Air Blank results must be .00 – If not, void the test, see Step F.)

L. ☑ At the end of a test the instrument will print the results and eject the test record card. DO NOT REMOVE THE TEST RECORD CARD until it is ejected by the instrument. REPEAT STEPS I through K as necessary. Two acceptable breath tests must be obtained that are within .02 of each other in order to complete a valid test. Record the lower of two proper tests as the final result.

II. COMPLETION

A. ☐ Record final result on Test Record and Master Log Sheet.

B. ☑ Verify time, date, and results on Test Record Card.

C. ☑ Separate Test Record
1) Officer copy to Officer.
2) Subject copy to subject.
3) Staple court copy to checklist.
4) Hard copy in lab box.

D. ☑ Sign "Operator" section on bottom of checklist.

E. ☑ Remind Officer to fill out admonishment on back of checklist.

III. COMMENTS

Put comments on both Test Record Card and this sheet. _____

_____

_____ Breath Test Refused ____

_____ Other Test Given U-____ B-____

PD-1914-A (Rev. 3-88)

THIS SIDE UP THIS EDGE IN FORM NUMBER 012010

SN 64-000897
E27.27
INVALID TEST.
SAMPLE INTRODUCED
AT IMPROPER TIME.

04/19/96
17:25

SAN DIEGO POLICE DEPT. – BREATH TEST RECORD

1-96-2924	COMMENTS:
FINAL RESULT	
0. _____ %	

AVRS VALUE	OPERATOR	ID#	TITLE
	R. FABREGAS	4584	P.O. II

OFFICER: PLEASE FILL IN EVERYTHING BELOW LINE

SUBJECT NAME	DOB	ADULT / JUV
GENZLER, DAVID J.	11/03/70	X / ☐

ARRESTING OFFICER	ID#	CHARGE
CRISTINZIANI	2913	187(A)PC

OBSERVED SUBJECT: Continuously observed subject for at least 15 minutes during which time the subject has not ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked.

PRINT NAME	ID#	DATE
JOSEPH CRISTINZIANI	2913	04/19/96

PD-1913 LA (Rev. 7-88) OFFICER'S COPY

OPERATOR	ID#	DATE
FABREGAS, R	4584	4-19-96

000031

App. 126

SUSPECT PROCESSING REPORT

DATE: 04/19/96

SUSPECT: GENZLER, DAVID JAMES

VICTIM: HARLESS, DUSTIN ERIC

TIME	DESCRIPTION	OBTAINED BY
	HANDWRITING: Right ____ Left ____	
1521	PHOTOGRAPHS	AVERY #8711
1725	BREATHALYZER: #96-3234	OFFICER FARRERAS #7581
1713	BLOOD: #B96-3233 Dispo: RH #138 (Tech/Room 138/Etc) Purple Top: ____ Yellow Top: ____ Grey Top: ____ Total Vials: ____	HELEN SAMSON #390 WESTERN NURSES
1551	URINE: #U96-3233 Dispo: RH #138 (Tech/Room 138/Etc)	CRISTINZIANI
	GUNSHOT RESIDUE: # ____ Location Taken: ____	
1555	PRINTS (MAJOR CASE)	CRISTINZIANI
	DOCTOR'S EXAMINATION Hospital: ____	
	HEAD HAIR TO SHORT TO OBTAIN	
1536	PUBIC HAIR	AVERY
1535	BODY HAIR	AVERY
1530	SALIVA	AVERY
	PENIS SMEAR	
1527	FINGERNAIL SCRAPINGS	AVERY
1542	CLOTHING OBTAINED: BLK BOOTS, BLUE JEANS, BLUE PLAID HOODED PULL OVER SHIRT, DARK BLUE TEE SHIRT AND WHITE SOCKS.	AVERY
	OTHER PROPERTY: ____	

000032

Reporting Officer J. CRISTINZIANI ID# 3943 Homicide Team III

Approved By [signature] Date of Report 04/19/96 Time 1730 Hours

App. 127

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder – SDPD Case #96-026516

VICTIM:	**HARLESS, Dustin Eric** W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110
SUSPECT:	**GENZLER, David James** W/M (25) DOB: 11-03-70 SSN: 551-81-3754 CDL: U6027359 7217 Ariflo Street San Diego, CA 92111 Student: San Diego State University
SUBJECT INTERVIEWED:	**ALFONT, Michele** W/F DOB: 03-10-61 2106 Cowley Way San Diego, CA 92110 Home Phone: 276-8426 SSN: 313-74-2064 Work Phone: 276-6515

WITNESS STATEMENT:

On May 29, 1996, at 1730 hours, I interviewed Michele ALFONT in my unmarked police vehicle at 1133 West Morena Boulevard. The interview was conducted with only ALFONT and myself present. I told ALFONT the purpose

for my interview. I asked ALFONT to tell me what Sherry LOGEL told her at her house. ALFONT essentially related the following. For complete statements, the audio tape should be reviewed.

> Sherry (LOGEL) came over to my house, 2106 Cowley Way. I don't remember the date or time. Sherry told me David (GENZLER) called her. David told Sherry that he had just killed someone and he was crying. David wanted Sherry to go to the Old Town Inn motel and talk to him. Sherry told me she wanted to go to the motel to see David. Jan and I advised Sherry not to go see David because he was only going to use her.
>
> Sherry referred to David as her ex-boyfriend. They were no longer together. Jan and I were worried David was going to get Sherry involved. I asked Sherry why David didn't call his girlfriend, Rosemary & Jan and I were afraid David would ask Sherry to get rid of the car. Sherry left the house to go visit David.

I asked ALFONT if she remembered what day this happened. ALFONT replied:

> It seemed like it was immediately after the incident. He was still very upset and crying. He was going to turn himself in after he talked to Sherry.

I asked ALFONT if Sherry contacted her after she left to see David. ALFONT replied:

> Yes, she came into the store (Cut a Rug). Jan and I asked Sherry if she had gotten rid of the car. Sherry told us no. She said she didn't know anything about the car.

I asked ALFONT if Sherry ever went to the store and talked to her about the car. ALFONT replied:

> Sherry came in. We asked her if she knew anything about the car. She said no, she didn't know anything about the car. A couple of times we asked her, "Come on Sherry, do you know anything about the car?" We asked her if she hid it or got rid of it for him. Sherry said no.

I asked ALFONT if it was after GENZLER turned himself in that they questioned Sherry about the car. ALFONT said it was.

I asked ALFONT if the next time she talked to Sherry was about the knife incident. ALFONT replied:

> Yes. The next time I talked to Sherry was about the knife incident. That was the next significant thing I remember.

I asked ALFONT what her conversation with Sherry was at that time. ALFONT replied:

> About three weeks ago from today's date (05-29-96), Sherry came to the business (1133 W. Morena Blvd). Sherry told me she had just returned from David's (GENZLER's) attorney's office and that she had turned the knife in to him (GENZLER's attorney). I remarked back, "Why would the defense attorney want the knife if that's incriminating evidence. That's only going to hurt David." Sherry said that's what she was asked to do, to take it in to David's lawyer.

I asked ALFONT if Sherry told her what kind of knife it was. ALFONT replied:

> She mentioned, "Wouldn't you know it? It's the knife I gave him for a present" and somehow it was brought out it was some kind of fishing knife or scaling knife.

I asked ALFONT if she ever saw Sherry come into the store with the knife. ALFONT replied:

> No, I never saw the knife. I never had any indication she had it on her at any time. I asked ALFONT if Sherry ever came into the store with David's personal belongings like clothes. ALFONT replied no.

I asked ALFONT if she knew the name of David GENZLER's attorney. ALFONT replied no.

I asked ALFONT if Sherry told her that she talked to David's attorney. ALFONT replied:

> Sherry told me David's attorney was not very happy with her because she had talked to the police. Sherry said the attorneys got to everyone except for her. The attorneys didn't want Sherry to talk to the police. Sherry gave David up and placed him at the scene. The attorneys were upset with Sherry because she placed him at the scene and told the police it was self defense. Up to that point, the police hadn't been able to place David at the scene.

I asked ALFONT if she was aware of any phone calls Sherry LOGEL made to David GENZLER's attorney from the business. ALFONT replied:

> Not that I'm aware of.

I asked ALFONT if she has since found out that Sherry did make a telephone call to the defense attorney. ALFONT replied:

> Yes, from my roommate who owns the business. It was possibly a few days ago, possibly some time during last week.

ALFONT had no additional information to offer and I concluded my interview at 1800 hours.

Reporting Officer D. WARRICK, Detective ID# 4199
Homicide Team III Approved By MARTIN 1591
Date of Report 06-10-96 cc Time 0930 Hours

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder – SDPD Case #96-026516

VICTIM:	**HARLESS, Dustin Eric** W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110
SUBJECT INTERVIEWED:	**DAVIS, Scott Taylor** W/M (33) DOB: 01-05-63 SSN: 302-74-2782 2180 Cable Street, Apt. #2 San Diego, CA 92107 Phone: 523-1316 U.S. Navy – Rating A-01 Strike Weapons/NAS Miramer Part time bartender Tony's Bar 5034 Newport Avenue San Diego, CA 92107

WITNESS STATEMENT:

After responding to the scene of a stabbing death at Cable and Voltaire Street, Sergeant MARTIN directed me to interview Scott DAVIS, a witness to the incident. I met with DAVIS at the scene and he agreed to accompany me to Headquarters.

At about 0620 hours, I began an interview with DAVIS. The interview was audio taped. I asked DAVIS to tell me what he had seen take place that evening. DAVIS told me in essence:

> I was driving home after giving a couple of sailors a ride back to their ship. They had been drinking at the bar I worked at and I didn't want them to drive so I gave them a ride after I closed the bar. Anyway, I had just turned on to Cable street from West Pt. Loma Boulevard. There was a car up ahead of me that was just stopping at Voltaire. I saw the brake lights come on.
>
> As I continued south on Cable, I saw a couple, a man and a woman walking hand and hand in the crosswalk, heading eastbound at the intersection of Cable and Voltaire. The man was carrying a six pack of bottled beer. As I pulled up to the car that was stopped at the stop sign, the driver got out of the car and approached the couple. They had their backs to the guy as he approached them.
>
> I stopped right behind the other car. It looked like there was going to be a fight so I got out of my van and as I did, I saw the driver of the car punch the male pedestrian in the face, knocking him to the ground. The pedestrian's six pack flew across the street and the bottles smashed to the ground.
>
> The woman began to scream. As I got closer to them, I saw the driver pull a knife from the right side of his pants. The pedestrian was still on the ground. The driver pushed the pedestrian with his left hand and using his right hand, plunged the knife into the victim's chest. He was yelling

at the victim, saying, "You want some of this, you want some of this?"

I had been walking towards them until I saw the suspect stab the victim then I ran towards them the remaining few steps. I grabbed the suspect with my right arm, pinning his right arm against his body to keep the knife restrained. Then I used the index finger of my left hand, placing it under his nose and pulled him off the victim. That grip is called a nose ~~grab~~ [drag]. In one move, I threw the suspect to the ground near the left front fender of his car.

I then looked back towards the victim. He was standing up now. There was blood, spurting out of his chest. I yelled at the woman to call the police as she and the victim moved to the sidewalk at the north~~east~~[west] corner. I looked back to the suspect to find him on his feet again with the knife still in his right hand. He was waving the knife at me saying, "You want some of this, you want some of this?" as he waved the knife at me with slashing moves.

I backed away from the suspect, keeping about eight feet between us. I moved in front of his car and he followed, still waving the knife and yelling at me. When I got near the right side of his car, I backed up towards the rear. I kept telling him to calm down. I was trying to keep him distracted so he wouldn't go after the woman and the victim who were standing there on the sidewalk. As I got to the rear of his car, I moved between his car and my van. Then I ran to my door, got into the van and locked the doors.

As I got in my van, the suspect jumped up on the front bumper of my van and pounded on the

> windshield with his right hand. It looked like he was trying to smash the window with the butt of the knife. He was still yelling at me. I put the van in reverse and punched the gas and the suspect fell off the front of the van. He fell down out of sight, briefly, as I backed up. I stopped the van and he jumped and started to climb onto the bumper again but as I put the van into drive, he must have seen this because he quickly moved towards the curb to get out of my way. He probably thought I was going to run over him.
>
> I pulled around his car and drove south on Cable Street away from the scene. I looked in my rear view mirror just before I turned westbound onto Muir. I saw the suspect's car with the headlights on still in the same place. I drove down Muir to Bacon Street then went north on Bacon and pulled into the 7/11 Store at Bacon and Voltaire.
>
> I ran into the 7/11 Store and told the clerk in the store to call the police and EMS, that a guy had been stabbed at Voltaire and Cable and he was bleeding profusely. I ran back to my van and drove back to the scene. As I pulled up and parked on Voltaire, I saw the victim lying on the sidewalk with his girlfriend and several other people around him trying to help him. The suspect and his car were gone. I ran over to the victim and checked his vital signs. He was still breathing and had a pulse. A police officer arrived and took charge and I backed away.

I asked DAVIS to describe the suspect and his vehicle and he said, in essence:

> The man that stabbed the victim was a white male, 23 to 26 years old, about 6'4", and 180 pounds with a thin build. His hair was brown or

> black. It was wavy and about three to four inches long. He may have had a goatee but it was hard to tell because the lower part of his face was covered in blood. He was wearing wire rimmed glasses. He had on a white t-shirt with some sort of design on the front. The shirt was soaked in blood. I think he wore jeans that were blue or black.
>
> His car looked like a blue, two door, small Nissan or Datsun type older car, maybe a mid-80's model. There was no one else in the car. I think the dome light may not work because it was dark inside the car while the driver door was open.
>
> The knife the suspect used had a four inch blade on it. The blade looked like it was chrome, it was real shiny. I saw a part of the handle. It was black. The blade was rounded on the bottom, like a fish belly.

I asked DAVIS to draw an example of the knife on a piece of notebook paper and he did so. A copy of that drawing is attached to this report.

I drew an intersection on a piece of paper and labeled it as Cable Street and Voltaire. I then asked DAVIS to draw in the locations of the suspect's vehicle and his own when he got out of his van to intercede. I asked him to place circles where the victim and his girlfriend were and a triangle, indicating the suspect's location. After he did this, he used the diagram to show me what happened while he was at the scene. I had DAVIS sign the diagram and I later gave it to Evidence Technician Gary AVERY.

I asked DAVIS if he recognized the suspect or the victim and he said, in essence:

> I'm a ~~bartender~~ [doorman] at Tony's, a local bar in Ocean Beach and all the locals come into the bar from time to time. I've seen the victim and

> his girlfriend in the bar before. They seemed like real nice people. I've never seen the suspect before.

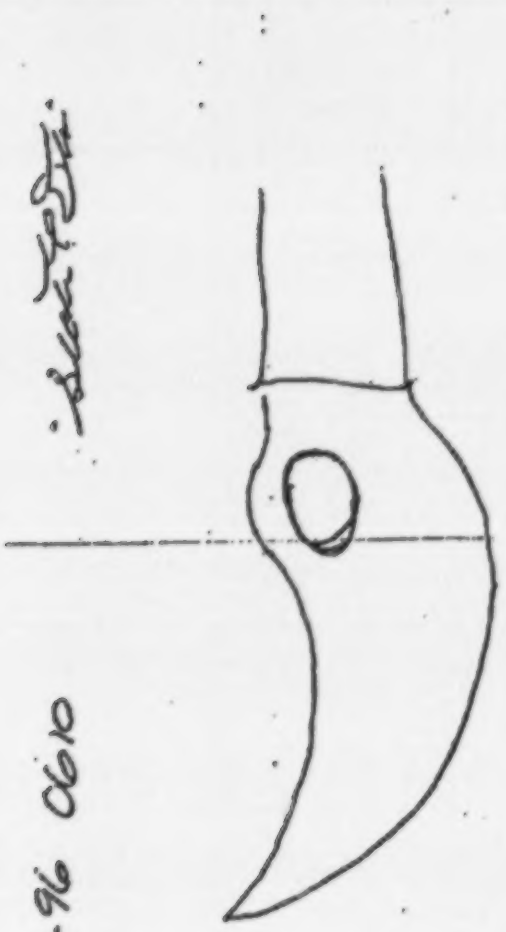
I asked DAVIS if he'd recognize the suspect if he saw a photo of him and he said he probably would. I read to DAVIS the admonishment statement for a photographic line-up review and then gave him a stack of six photographs to look at. A photograph of Anthony GENZLER was included in the line-up.

DAVIS looked through the stack several times. He appeared to carefully studying the photographs. After a few moments, he showed me photograph #6. Photographic #6 is a filler photo in the photo line-up. DAVIS said, in essence:

> This guy in this photo is most similar to the suspect because he has a thinner face then the rest of the people in the photos, but I can't say I recognize anyone here.

A copy of the completed photographic line-up review form signed by DAVIS is attached to this report.

Reporting Officer R. F. JACKSON, Detective ID# 1463
Homicide Team III Approved By _____
Date of Report 04/22/96/re Time 0800 Hours


4-18-96 0610

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.):	April 18, 1996 (Thursday)
TIME (occurr.):	0237 Hours
LOCATION:	2200 Cable Street
SUBJECT:	187(a) PC, Murder – SDPD Case #96-026516

VICTIM:	**HARLESS, Dustin Eric** W/M (25) DOB: 08-24-70 SSN: 556-29-7625 CDL: A1468989 2530 Galveston Street San Diego, CA 92110
SUBJECT INTERVIEWED:	**FLANDERS, Sky B.** W/F (21) DOB: 05-07-74 SSN: 083-58-7279 2530 Galveston Street San Diego, CA 92110 Hone Phone: 275-4617

WITNESS STATEMENT:

Synopsis:

On April 18, 1996, at approximately 0340 hours, I received a telephone call at home from Sergeant L.D. MARTIN. I was instructed by Sergeant MARTIN to respond to the intersection of Voltaire and Cable Street in Ocean Beach to assist in the investigation of a homicide. I arrived at the scene at approximately 0445 hours and met with other members of Homicide Team III. When all the members of Homicide Team III were present, we were briefed by Sergeant CROCKETT, ID #3760 regarding the details of this case.

After the briefing, I was instructed by Sergeant MARTIN to interview the victim's girlfriend Sky FLANDERS, who was at UCSD Medical Center. During the briefing, I learned that FLANDERS was accompanied by Officer N. McELFRESH. I contacted Officer McELFRESH over the radio and instructed him to transport FLANDERS to the Homicide Office for an interview. McELFRESH informed me that he would arrive to the Homicide Office in approximately fifteen to twenty minutes.

During the briefing, I learned that FLANDERS had obtained a license plate number from the suspect vehicle. Subsequent computer work revealed that a possible driver of the suspect vehicle was an Anthony GENZLER. Prior to leaving the scene and responding to the Homicide Office, I was asked by Sergeant MARTIN to attempt to locate a photograph of Anthony GENZLER (who had prior police contacts) and compile a photographic line-up to present to the witnesses in this case.

I arrived at the Homicide Office at approximately 0515 hours. I conducted a computer records check and located a booking photo of Anthony GENZLER. I then compiled a color photographic line-up using six photographs including the photograph of Anthony GENZLER which was photograph number three. Officer McELFRESH arrived at the Homicide Office at approximately 0530 hours. He was accompanied by Sky FLANDERS. At approximately 0600 hours, I began my interview with FLANDERS in Interview Room #1. The interview was audio and video recorded.

Details:

Prior to the interview, FLANDERS requested that the Crisis intervention person, Nina COCHRAN, accompany

her during the interview. I asked FLANDERS to describe the chain of events that led up to her boyfriend being stabbed at the intersection of Voltaire and Cable Street. FLANDERS essentially related the following:

> Last night, my boyfriend Dusty and I went out drinking. We first went to "Dream Street" which is a bar in Ocean Beach. We arrived there around 11:00 at night and left sometime around midnight when a fight broke out among some of the patrons. Dusty (Dustin HARLESS) was not involved in the altercation. From "Dream Street", we drove to another bar in Ocean Beach called "Tony's". – We stayed at "Tony's" until last call, approximately 1:45 in the morning. While at "Tony's", we each had several drinks. After we left "Tony's", we got a ride from one of Dusty's friends to a deli/liquor store on Voltaire Street called "Litickers". There, Dusty bought a six pack of "Heineken". We then walked over to another one of Dusty's friend's house. I only know this friend by his first name which is Jim. We hung out at Jim's house and drank some more beer until approximately 2:30 in the morning. We left Jim's and were heading west on Voltaire Street. We were planning on catching a cab at the 7/11 located at Voltaire and a couple of streets west of Cable. Dusty told me that there is usually a cab parked there waiting for fares.
>
> As we walked on Voltaire Street, we approached Cable Street. It was starting to rain and Dusty stopped at the corner to zip up his jacket. I continued walking ahead of him and walked into the intersection. I noticed there was a vehicle stopped at the stop sign facing southbound. As I crossed the street, the male driver in the vehicle reached across the passenger's side and rolled

down the front passenger's door window. The male began to ask me if I wanted a ride and asked me to get in the car.

I tried to ignore the male but he continued talking to me and asking me to get in the vehicle. By this time, Dusty had walked into the street and saw what the male was attempting to do. Dusty walked up to the driver's door window and knocked on the window. The male turned his attention towards Dusty and opened the driver's side door. He got out of the car and I noticed that while he was in the car, he was wearing a pair of glasses. As he got out of the vehicle, he took his glasses off and threw them back in the car and he walked towards Dusty, who was still standing by the driver's side door. He began walking towards Dusty in a threatening manner and yelling and cursing at Dusty, challenging him to fight.

At some point, Dusty and the male got into a physical confrontation and began to fight in the middle of the street near the male's vehicle. At one point, Dusty was on top of the male.

As Dusty and the male fought in the street, a friend of Dusty's who was a bouncer at a nearby bar, pulled up in his van behind the male's vehicle. Dusty's friend got out of his van and tried to separate Dusty and the male. As Dusty's friend approached the two, I noticed that Dusty had gotten up and had blood on his shirt. Initially, I assumed that this was the other male's blood but then I noticed that the male had also gotten up and was holding a knife.

Dusty began to hold his chest and stagger away from the car. The male with the knife began to

chase Dusty's friend who ran back into his van and began backing up away from the male. The male was acting crazy and still holding the knife in his right hand. The male with the knife ran around the front of his car and towards Dusty's friend who was now in his van. The male began to punch and kick the van as the van drove back in reverse. The male then got into his car and began to drive away. I attempted to get the license plate number from the car as the male drove away. I managed to memorize the plate as the male continued driving southbound on Cable Street across Voltaire.

As the male drove away, I flagged down a passing pick up truck and asked the male in the pick-up truck to write down the license plate which I had memorized from the car. I then asked the driver of the vehicle that I had flagged down to go to the pay phone and call 9-1-1 and get an ambulance for my boyfriend who had been stabbed. The driver of the vehicle wrote down the license plate number on a business card and returned later after he had called the police and gave me the card. I subsequently gave that card to a police officer.

After the male with the knife drove away, Dusty staggered out of the street and onto the sidewalk, walking westbound on Voltaire. He collapsed on the sidewalk and I stayed with him until the paramedics arrived.

I asked FLANDERS if she could describe the vehicle and the suspect with the knife. FLANDERS essentially stated the following:

The male with the knife was taller than Dusty. He was over six feet tall. He was medium built. Not to thin and not really muscular. He had

short, cropped, blondish hair and I believe he also had a thin goatee. He was wearing a white t-shirt with a circular emblem on the front and back. He also had on either gray or green khaki type shorts. The vehicle was a light tan or gray color, smaller vehicle, similar to a Nissan Altima. The car was rounder and not box like, like a Volkswagen Jetta. I believe that the vehicle was a two door sedan.

The knife that the male was holding appeared to be a switchblade type of knife with a pointed blade about three or four inches in length.

I told FLANDERS that I was going to show her a photographic line-up and read her the photographic line-up admonishment. I then proceeded to show her the photographic line-up which included a photograph of Anthony GENZLER in position number three. I allowed FLANDERS to view the photographs. After several seconds, FLANDERS indicated that photograph number six most resembled the suspect, except that the suspect's hair was shorter.

At approximately 0700 hours, I concluded my interview with FLANDERS. I provided her with my business card and asked her to call me if she recalled any other details regarding this case.

Reporting Officer J. DURAN, Detective ID# 4207
Homicide Team HEAT Approved By [Illegible]
Date of Report 04/18/96ra Time 1300 Hours